JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

A

Public Prosecutor v Chew Wai Keong & Anor and another application

B

HIGH COURT (IPOH) — CRIMINAL TRIAL NOS 45B-10 OF 2009 AND 45–21 OF 2007
TEO SAY ENG JC
29 MARCH 2013

C

Criminal Law — Kidnapping Act 1961 — Ingredients to be proven — Victim wrongfully confined or restrained with intent to hold him for ransom — Ransom demanded for release of victim — Overwhelming circumstantial evidence to prove that accused committed offence

D

Evidence — Circumstantial evidence — Kidnapping and murder — No direct evidence — Whether evidence pointed irresistibly to guilt of accused — Kidnapping Act 1961 s 3 — Penal Code ss 34 & 302

E

Evidence — Information leading to fact discovered — Admissibility depends on voluntariness — Whether information given by accused distinctly related to what was discovered — Whether element of concealment fulfilled — Whether inadmissibility of information supplied by accused affects admissibility of evidence of his subsequent conduct — Evidence Act 1950 ss 8 & 27

F

Evidence — Presumptions — Adverse inference — Failure by prosecution to call witness — Whether prosecution case proven without any gaps — Whether adverse inference arose — Evidence Act 1950 s 114(g)

G

Both the accused were charged with the offence of having kidnapped one Teh Wai Toong for ransom and later murdering him. Both the accused were charged under s 3(1) of the Kidnapping Act 1961 to be read with s 34 of the Penal Code ('the Code') and under s 302 of the Code to be read with s 34 of the same Code. There was no eye witness in the case. The prosecution had to rely on the circumstantial evidence to prove the two charges against both the accused. SP26 (the deceased's sister) testified that the deceased had on 20 April 2007 left his house and never returned. She tried calling the deceased on his handphone but there was no reply. On 23 April 2007 SP26 received a SMS from the deceased's phone saying that he went to meet one Dolphine and would be home at 9.30pm SP26 replied the SMS warning that if she did not see the deceased, she would lodge a police report. At about 7pm, SP26 received a phone call from the deceased's phone. The caller was a male Chinese who spoke

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JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

in Cantonese telling her that the deceased was in his hand and told her not to make any police report. Subsequently on 24 April 2007 SP26 received a SMS demanding for ransom. The first and second accused had rented a house at Bercham, Ipoh ('the Bercham house'). On 22 April 2007, the second accused had used the deceased's credit card to make some purchases at Jaya Jusco. On 29 April 2007, the deceased's body was found at a rubbish dump. On 1 May 2007 a raid was conducted on house No 23, Kampar Avenue Kampar Garden, Ipoh where the second accused was arrested. Another raid at house No 113 Kampung Bharu Mambang Diawan Kampar led to the arrest of the first accused. During interrogation, the first accused was willing to show the scene of crime. SP38 then took out a piece of paper and jotted down the questions and answers in that piece of paper (ID156). The first accused said he could show the house in Bercham where Tony was detained. After the questions and answers were jotted down, the first accused signed at the bottom of ID156. Based on the information given, SP38 and his police party were brought by the first accused to the Bercham house where some incriminating exhibits were found. While in the house, SP38 asked the first accused regarding the whereabouts of the deceased's car and the first accused agreed to show the place. This was recorded on a piece of paper (marked ID157). The first accused the took SP38 and his police party to a back lane of a factory where they found the car. The defence raised by the first and the second accused consists of two parts: (a) the alibi defence of the first and the second accused persons that between 20 April 2007 and 29 April 2007, they were in their respective homes in Kampar. They denied having gone to the No 2 Bercham house, (b) Dolphine was the person who borrowed the keys to the No 2 Bercham house from the first accused on 18 April 2007 and returned the keys to the first accused on 29 April 2007. It was Dolphine who gave the deceased's handphone to the first accused asking him to keep for a few days and it was Dolphine who told the first accused that the deceased's car was parked in the industrial area.

Held, convicting the first and second accused and sentencing them to death by hanging:

(1) It is trite law that where the prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient (see para 63); *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 referred.

(2) The prosecution had proven the following ingredients in respect of the murder charge: (a) the identity of the deceased that is Teh Wai Toong'; and (b) the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death (see para 99).

(3) In respect of the kidnapping charge, the prosecution had proven that the deceased had been wrongfully confined or restrained with intent to hold

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

him for ransom and a ransom of RM200,000 was demanded for the release of the deceased (see para 100).

(4) All the circumstantial evidence had been successfully established beyond reasonable doubt by the prosecution. The prosecution had proved beyond reasonable doubt that it was both the accused persons who had kidnapped and murdered the deceased in furtherance of the common intention of both of them. All the circumstantial evidence drove the court inevitably and inexorably to one and only one conclusion, that is, both the accused persons were the perpetrators of the said two offences (see para 102).

(5) Section 114(g) of the Evidence Act 1950 ('the Act') should not be invoked against the prosecution for not calling Dolphin as a witness. First and foremost only the name 'Dolphine' without any particulars was mentioned in the SMS received by SP26 from the deceased's handphone. Although Dolphine was an internet friend of the deceased, failure to call Dolphine as a witness did not affect the prosecution case at all firstly because all the circumstantial evidence has established only the first and the second accused were involved in this case and had left no gap in the prosecution case. Secondly, the said message received by SP26 was probably sent by the suspects (see paras 108–110).

(6) Voluntariness of the information is not an element to be satisfied in determining the admissibility of information under s 27 of the Act. However, ID156 was inadmissible on the following grounds: (a) the information given by the first accused did not distinctly relate to what was discovered, that is, the house and the incriminating articles found therein; (b) the finding of the No 2 Bercham house did not have the characteristic of being hidden. The said house could have been found by the police with a proper investigation even without the assistance of the first accused. ID157 was also rules inadmissible for the same reason that the element of concealment had not been fulfilled in that the said car was not concealed and could have been found easily by a proper investigation on the part of the police (see paras 127–129).

(7) The inadmissibility of the information supplied by the accused does not affect the admissibility of the evidence of his subsequent conduct under s 8 of the Act irrespective of s 27. The subsequent conduct of the accused in leading the police party to the recovery of the house and the incriminating articles found therein and the recovery of the deceased's car key from the wall of the Bercham's house as pointed out by the first accused which led to the recovery of the deceased's car in the back lane of a factory in the industrial area in Bercham in respect of the first accused and also the recovery of the items purchased from Jaya Jusco Ipoh in respect of the second accused were all subsequent conducts which were

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

admissible under s 8 of the Act which went to show that the accused persons had knowledge of the existence of such exhibits (see paras 131–132); *Amathevelli a/p Ramasamy v Public Prosecutor* [2008] 3 MLJ 782 referred.

(8) The purported alibi defence raised by the first and the second accused failed to create any reasonable doubt in the prosecution case (see para 221).

(9) On the defence whether Dolphine could be the person who kidnapped and murdered the deceased, the defence was totally without merits (see paras 222–223).

[Bahasa Malaysia summary

Kedua-dua tertuduh telah dituduh dengan kesalahan menculik Teh Wai Toong untuk wang tebusan dan kemudian membunuhnya. Kedua-dua tertuduh telah dituduh di bawah s 3(1) Akta Penculikan 1961 dibaca bersama s 34 Kanun Keseksaan ('Kanun') dan di bawah s 302 Kanun dibaca bersama s 23 Kanun yang sama. Tiada saksi utama dalam kes ini. Pihak pendakwaan hanya bergantung kepada keterangan mengikut keadaan untuk membuktikan dua pertuduhan terhadap kedua-dua tertuduh. SP26 ('kakak si mati') memberi keterangan bahawa si mati telah pada 20 April 2007 meninggalkan rumahnya dan tidak pulang. Dia cuba menghubungi si mati melalui telefon bimbitnya tetapi tiada jawapan. Pada 23 April 2007 SP26 menerima SMS daripada telefon si mati menyatakan yang dia telah pergi berjumpa Dolphine dan akan pulang pada pukul 9.20 malam. SP26 menjawab SMS itu dengan memberi amaran jika dia tidak melihat si mati, dia akan membuat laporan polis. Lebih kurang pukul 7 malam, SP26 telah menerima panggilan daripada telefon si mati. Pemanggil adalah seorang lelaki Cina yang bercakap Kantonis memberitahunya bahawa si mati dalam tangannya dan memberitahunya untuk tidak membuat apa-apa laporan polis. Berikutan itu pada 24 April 2007 SP26 menerima SMS menuntut wang tebusan. Tertuduh pertama dan kedua telah menyewa rumah di Bercham, Ipoh ('rumah Bercham'). Pada 22 April 2007, tertuduh kedua telah menggunakan kad kredit si mati untuk membuat belian di Jaya Jusco. Pada 29 April 2007, mayat si mati telah dijumpai di tempat pembuangan sampah. Pada 1 Mei 2007 serbuan telah dilakukan di rumah No 23, Kampar Avenue Kampar Garden, Ipoh di mana tertuduh kedua telah ditangkap. Satu lagi serbuan di rumah No 113 Kampung Bharu Mambang Diawan Kampar membawa kepada tangkapan tertuduh pertama. Semasa soal siasat, tertuduh pertama dengan rela menunjukkan tempat kejadian jenayah itu. SP38 kemudian mengeluarkan sekeping kertas dan menulis soalan-soalan dan jawapan-jawapan di atas kertas itu (ID156). Tertuduh pertama menyatakan dia boleh menunjukkan rumah di Bercham di mana Tony ditahan. Selepas soalan-soalan dan jawapan-jawapan itu ditulis, tertuduh pertama menandatangani di bahagian bawah ID156. Berdasarkan maklumat yang diberikan, SP38 dan pasukan polisnya telah dibawa oleh

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

tertuduh pertama ke rumah Bercham itu di mana mereka menjumpai kereta itu. Pembelaan yang ditimbulkan oleh tertuduh pertama dan kedua mengandungi dua bahagian: (a) alibi pembelaan tertuduh pertama dan kedua bahawa antara 20 April 2007 dan 29 April 2007, mereka berada di rumah masing-masing di Kampar. Mereka menafikan telah pergi ke rumah Bercham No 2 itu; (b) Dolphine adalah orang yang meminjam kunci-kunci kepada rumah Bercham No 2 itu daripada terutuduh pertama pada 18 April 2007 dan telah memulangkan kunci-kunci itu kepada tertuduh pertama pada 29 April 2007. Ia adalah yang Dolphine memberikan telefon bimbit si mati kepada tertuduh pertama memintanya untuk menyimpannya untuk beberapa hari dan ia adalah Dolphine yang memberitahu tertuduh pertama bahawa kereta si mati telah diparkir di kawasan perindustrian.

Diputuskan, mensabitkan tertuduh pertama dan kedua dan menjatuhkan hukuman gantung sampai mati ke atas mereka:

(1) Adalah undang-undang tetap bahawa di mana pihak pendakwaan bergantung kepada keterangan mengikut keadaan, beban terletak ke atasnya adalah berat dan keterangan tersebut perlu menunjukkan kebersalahan tertuduh. Jika terdapat lompang di dalamnya maka ia adalah tidak mencukupi (lihat perenggan 63); *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561 dirujuk.

(2) Pendakwaan telah membuktikan elemen-elemen berkaitan pertuduhan membunuh: (a) identiti si mati iaitu Teh Wai Toong; dan (b) kecederaan yang dialami oleh si mati adalah mencukupi dalam perjalanan biasa untuk menyebabkan kematian (lihat perenggan 99).

(3) Berhubung pertuduhan penculikan, pihak pendakwaan telah membuktikan bahawa si mati telah ditahan dengan salah atau dihalang dengan niat untuk menahannya bagi wang tebusan dan wang tebusan sebanyak RM200,000 telah dituntut untuk pelepasan si mati (lihat perenggan 100).

(4) Semua keterangan mengikut keadaan telah berjaya dibuktikan melampaui keraguan munasabah oleh pihak pendakwaan. Pihak pendakwaan telah membuktikan keraguan munasabah bahawa ia adalah kedua-dua tertuduh yang telah menculik dan membunuh si mati berikutan niat bersama kedua-dua mereka. Semua keterangan mengikut keadaan membawa kepada satu-satunya kesimpulan mahkamah yang tidak dapat dielakkan dan tidak boleh disekat, iaitu, kedua-dua tertuduh adalah pelaku-pelaku untuk dua kesalahan tersebut (lihat perenggan 102).

(5) Seksyen 114(g) Akta Keterangan 1950 ('Akta') tidak patut digunakan terhadap pendakwaan untuk tidak memanggil Dolphine sebagai saksi. Pertama sekali hanya nama 'Dolphine' tanpa apa-apa butir disebutkan

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

dalam SMS yang diterima oleh SP26 daripada telefon bimbit si mati. Walau pun Dolphine merupakan rakan internet si mati, kegagalan untuk memanggil Dolphine sebagai saksi tidak menjejaskan langsung kes pendakwaan pertamanya kerana semua keterangan mengikut keadaan telah dibuktikan hanya tertuduh pertama dan kedua terlibat dalam kes ini dan tidak meninggalkan apa-apa lompang dalam kes pihak pendakwaan. Keduanya, mesej tersebut yang diterima oleh SP26 mungkin dihantar oleh suspek-suspek (lihat perenggan 108–110).

(6) Kesukarelaan maklumat bukan elemen yang perlu dipenuhi dalam menentukan kebolehterimaan maklumat di bawah s 27 Akta tersebut. Walau bagaimanapun, ID156 tidak boleh diterima atas alasan-alasan berikut: (a) maklumat yang diberikan oleh tertuduh pertama tidak mengaitkan dengan terperinci apa yang ditemui, iaitu rumah dan artikel yang menunjukkan terdapat kesalahan yang dijumpai; (b) penemuan berhubung rumah Bercham No 2 tidak mempunyai ciri-ciri ia disembunyikan. Rumah tersebut boleh dijumpai oleh polis dengan siasatan sewajarnya tanpa bantuan tertuduh pertama. ID157 juga keputusan yang tidak boleh diterima untuk sebab sama bahawa elemen penyembunyian tidak dipenuhi di mana kereta tersebut tidak disembunyikan dan boleh dijumpai dengan mudah melalui siasatan sewajarnya oleh pihak polis (lihat perenggan 127–129).

(7) Maklumat tidak boleh diterima yang diberikan oleh tertuduh tidak menjejaskan kebolehterimaan keterangan berhubung tingkah laku seterusnya di bawah s 8 Akta tersebut tanpa mengambil kira s 27. Tingkah laku tertuduh seterusnya yang membawa sepasukan polis kepada penemuan rumah itu dan artikel yang menunjukkan kesalahan yang dijumpai serta penemuan kunci kereta si mati dari dinding rumah Bercham sebagaimana ditunjukkan oleh tertuduh pertama yang membawa kepada penemuan kereta si mati di lorong belakang sebuah kilang dalam kawasan perindustrian di Bercham berkaitan tertuduh pertama dan juga penemuan item-item yang dibeli dari Jaya Jusco berkaitan tertuduh kedua adalah kesemuanya tingkah laku yang boleh diterima di bawah s 8 Akta tersebut yang menunjukkan bahawa tertuduh-tertuduh mempunyai pengetahuan tentang kewujudan ekshibit-ekshibit tersebut (lihat perenggan 131–132); *Amathevelli a/p Ramasamy v Public Prosecutor* [2008] 3 MLJ 782 dirujuk.

(8) Alibi pembelaan dikatakan itu yang dibangkitkan tertuduh pertama dan kedua gagal untuk mewujudkan apa-apa keraguan munasabah dalam kes pihak pendakwaan (lihat perenggan 221).

(9) Berdasarkan pembelaan sama ada Dolphine mungkin orang yang diculik dan dibunuh oleh si mati, pembelaan itu sama sekali tiada merit (lihat perenggan 222–223).]

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

Notes

For a case on adverse inference, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

For a case on kidnapping, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1039.

For cases on admissibility depends on voluntariness, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2715–2176.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Amathevelli a/p R Ramasamy v PP [2009] 3 MLJ 782; [2008] 4 CLJ 413, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 323, FC (refd)

Jayaraman & Ors v PP [1982] 2 MLJ 306; [1982] CLJ 464, FC (refd)

Kathavarayan a/l Munisamy v PP [2009] 1 MLJ 837; [2009] 1 CLJ 125, CA (refd)

Lim Hean Chong @ Teo Hean Chong v PP [2012] 1 MLJ 149; [2012] 2 CLJ 1046, CA (refd)

Muhammad Safaruddin bin Baba & Anor v PP [2002] 4 MLJ 353; [2002] 4 CLJ 217, CA (refd)

PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161; [2008] 4 CLJ 1, FC (refd)

PP v Ini Abong and other trials [2008] 8 MLJ 106; [2009] 1 CLJ 526, HC (refd)

PP v Lin Lian Chen [1992] 2 MLJ 561, SC (refd)

PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)

Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37; [2005] 1 CLJ 466, CA (refd)

Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)

Suresh v State of Uttar Pradesh AIR 2001 SC 1344, SC (refd)

Legislation referred to

Criminal Code Procedure s 180(1)

Evidence Act 1950 ss 8, 27, 90A, 90A(2), 114(g)

Kidnapping Act 1961 s 3(1)

Penal Code ss 34, 300(a), (b), (c), (d), 302

Siti Fatimah bt Abu Talib (Nur Laila bt Mohd Nazil with her) (Deputy Public Prosecutor) for the prosecution.

R Naidu (Manjit Singh with him) (Ng Choo Beng, R Naidu & Partners) for the first accused.

Khirun Anuar (S Ravinchandaran & Anuar) for the second accused.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

Teo Say Eng JC:

BACKGROUND

[1] Both the accused were charged under s 3(1) of the Kidnapping Act to be read with s 34 of the Penal Code in Case No 45–21 of 2007 and under s 302 of the Penal Code to be read with s 34 of the same Code in Case No 45B-10 of 2009.

[2] Both the cases were jointly tried.

[3] The kidnapping charge reads as follows:

> Bahawa kamu bersama-sama pada 20 April 2007, jam lebih kurang 11 malam hingga 26 April 2007 jam lebih kurang 2.30 petang, di rumah No 2, Laluan Bercham Utara 17, Taman Utama, Ipoh, dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan, telah mencolek Teh Wai Toong, KPT No 761221-08-5981, untuk mendapatkan wang tebusan sebanyak RM200,000 dengan cara mengurung secara tidak sah. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 3 Akta Colek 1962 (Akta 365) dibaca bersama s 34 Kanun Keseksaan.

[4] The murder charge reads:

> Bahawa kamu bersama-sama pada di antara 26 April 2007 jam lebih kurang 2.30 petang sehingga 29 April 2007 jam lebih kurang 2.30 petang, di rumah No 2, Laluan Bercham Utara 17, Taman Utama, Ipoh, dalam Daerah Kinta, dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan iaitu menyebabkan kematian ke atas Teh Wai Toong, K/P No: 761221-08-5981. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[5] There was no eye witness in the case. The prosecution has to rely on the circumstantial evidence to prove the two charges against both the accused. The prosecution has called 39 witnesses.

THE PROSECUTION CASE: CHRONOLOGY OF EVENTS

9 April 2007

[6] The first and second accused had rented a house at No 2 Laluan Bercham Utara 17, Taman Utama 31400 Ipoh from SP6 (Tang Wan Yau @ Tham Weng Yau) and SP7 (Tang Choy Lin). SP6 and SP7 confirmed that the first accused was the person who was paying the rental whereas the second accused was the one who signed the tenancy agreement. The tenancy agreement was tendered and marked as ('ID5').

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[7] SP5 (Thiyagarajan a/l Telaganu) who was a neighbour staying next door testified in court that he had seen the first and second accused at the above address ('No 2 Bercham house') in the month of April 2007.

20 April 2007

[8] SP26 is the main witness of the prosecution. She was the deceased's sister. The deceased was Teh Wai Toong who was the victim of this case. SP26, the deceased, their parents and a maid lived at No 38, Jalan Seri Klebang 12, Bandar Baru Seri Klebang Ipoh ('Klebang house').

[9] On 20 April 2007 at about 10pm the deceased left his house without informing any member of his family. SP26 said she did not see the deceased leaving the house but she heard the sound of the deceased's car engine and the automatic gate. The deceased was using Hyundai Elantra No AEJ 6928 which was marked as exh P75.

21 April 2007

[10] On 21 April 2007 sometime in the morning, the deceased's mother told SP26 that the deceased did not return home the previous night. SP26 was worried. At 10am SP26 phoned the deceased (012-5226543) using her handphone Sony Ericson No 016-5202639 (exh P133A). The deceased's phone was ringing but no one picked up. SP26 phoned the deceased several times and sent SMSes enquiring why the deceased did not come home. About 5pm SP26 received one SMS from the deceased's phone saying that he had gone to Penang with friends and he was drunk and would be back on Monday. SP26 did attempt to phone the deceased but he did not answer the call.

The purchase of handycam and Canon printer at Jaya Jusco Ipoh

[11] SP11 Syafarizal bin Mohamed Mahdi was a promoter at Jaya Jusco Ipoh. He told the court that on 21 April 2007 around 3pm the second accused came to the counter selling cameras in Jaya Jusco Ipoh to buy a handycam Sony *Siri* No 553876-K ('P29B') and a Cannon Printer CP780. The second accused was then wearing a black cap and a faded blue jacket. SP11 was showing the second accused how to use the handycam as requested. When the second accused agreed to buy, SP11 issued a cash memo dated 21 April 2007 ('P28B') with the price of RM2,872 for all the purchases made by the second accused. SP11 then took all the things purchased to the payment counter. The second accused followed suit.

[12] SP12 Nor Akma Raihan bt Hamdan was the cashier who received the cash memo P28B from SP11. SP12 confirmed that the second accused was

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

using a credit card in the name of Teh Wai Toong to pay for the purchases. SP12 asked the second accused to sign on the credit card slip ('exh 28A') in front of her. She said she had compared the signature signed by the second accused at the credit card slip exh P28A with the signature at the back of the credit card and they appeared to be the same.

22 April 2007: The purchase of teddy bear ('P31A') and other things

[13] On 22 April 2007, the second accused came to see SP11 again enquiring about Sony digital camera. SP11 showed him the camera which the second accused asked for and he agreed to purchase. SP11 then issued a cash memo dated 22 April 2007 ('P28D') and passed it together with the digital camera to SP12 who was then on duty at the cashier counter. The second accused came to the counter of SP12 to make payment for the computer parts, a camera and a teddy bear ('P31A'). SP12 said the second accused was referred to her by SP11 and another promoter SP23 for the payment of the things purchased. SP12 confirmed that the second accused was making payment using the Visa credit card MBB in the name of Teh Wai Toong. SP12 confirmed that the second accused signed on the credit card slip ('exh P28C') in front of her and she compared the signature given by the second accused with that at the back of Teh Wai Toong's credit card, and found that the signatures were more or less the same.

[14] Both SP11 and SP12 told the court that they could recognise the second accused because he came twice to Jaya Jusco to make purchases and was wearing the same cap and the same jacket. SP11 said she could recognise the second accused because she spent time showing the second accused how to use the handycam.

23 April 2007

[15] 23 April 2007 was a Monday. SP26 went to work as usual. SP26's mother contacted her telling her that the deceased's office had informed her that the deceased did not come to work. SP26 immediately returned home. She together with her mother went to Rakan's house to look for him but in vain. Rakan was a friend of the deceased. SP26 then sent SMS to the deceased to enquire about his whereabout. She then went to MAXIS Centre to find out the location of the last phone call made by the deceased but the MAXIS Centre refused to give. Between 4pm and 5pm SP26 received a SMS from the deceased's phone saying that he went to meet Dolphine and would be home at 9.30pm SP26 replied the SMS warning that if she did not see the deceased, she would lodge a police report. At about 7pm, SP26 received a phone call from the deceased's phone. The caller was a male Chinese who spoke in Cantonese telling her that the deceased was in his hand and told her not to make any police

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

report. SP26 was shocked on hearing that. When she wanted to enquire from the caller if he wanted money, the called hanged up the phone. Half an hour later SP26 received one SMS from the deceased's handphone saying:

> Tony is in my hand. If you do not want anything happened to him, you waits for my instruction. Do not lodge police report. If you lodge police report, you may keep his body.

After receiving the SMS, SP26 discussed with her father SP32 (Teh Eu Choon) and decided to lodge a police report. They went to Balai Polis Kampung Tawas to lodge a police report, that is Chemor Report 886/07 ('P132'). After lodging the police report, they returned home.

24 April 2007

[16] On 24 April 2007, based on the deceased's bank statement, SP26 phoned various banks instructing them to stop the usage of the deceased's credit card and she was told that there were still transactions by the deceased's credit card. SP26 then jotted down the deceased's credit card numbers in a book which is marked as exh P18A (which was given to her by the Chief Inspector Tan Chun Kim SP30). At about 11pm SP26 received a SMS from the deceased's handphone stating 'Get ready 200K' SP26 immediately informed SP38 DSP Thiew Hock Poh the investigating officer about the SMS.

25 April 2007

[17] On 25 April 2007, at about 9am Chief Insp Tan Chun Kim ('SP30') was instructed by ASP Mansor (SP36) to meet him in his office. In his office, SP36 instructed SP30 to go to room 1809 Ipoh City Hotel to discuss the case with him. SP26, SP32, SP36 and SP31 Eng Chee Yang (SP26's boyfriend) were told to meet at the said hotel.

[18] On arrival at the hotel, SP30 first met SP36 and SP38 then came SP26, SP32 and SP31. They then adjourned to Room No 1809. In the room 1809 SP26 was with SP38, SP30, SP36 and other police personnel. During the discussion, SP30 was assigned as the liaison officer and police middle man to observe and record all the movements in the house in a book prepared by him ('exh P18A'). After the said discussion, SP26, SP32 and SP31 returned home. SP26 did receive some SMSes before meeting the police in Ipoh City Hotel and she had jotted down all the SMSes in the book P18A. All the SMSes received by SP26 and sent by her were recorded in P18A.

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

26 April 2007

[19] All the SMSes received by SP26 from the deceased's handphone and sent by SP26 to the deceased's handphone were related to SP28 (Sjn Azman Shah bin Abdullah) and SP30 and were recorded in P18A by SP32, SP38 and SP31. Some of the SMSes received are produced here below:

Jam 10.04 pagi, SP26 telah menerima SMS yang menyatakan:

Get ready RM200K by tomorrow nite. I shall inform u again.

Jam 10.11 pagi, SP26 terima SMS yang menyatakan:

Later I will send the website to you. Mean while, you transfer RM4K to Tony Maybank Account today so that he will have food to eat.

Jam 10.20 pagi, SP26 terima SMS yang menyatakan:

Pay earlier, sure he can have food to eat earlier. Today bank in RM5K and mean while get ready RM200K cash all in old RM100 note that number must not in sequence.

Jam 3.52 petang, SP26 terima SMS yang menyatakan:

I demand RM5K, u give RM1K. How about I give you Tony Finger first?

27 April 2007

[20] All the SMSes received and sent were informed to SP28 and SP30 and were recorded in P18A. SP32, SP38 and SP31 recorded every movement in P18A.

[21] One of the SMSes received, is produced below:

Jam 5.34 petang, SP26 terima SMS yang menyatakan:

www.savefile.com/files/674365 online and see now

28 April 2007

[22] All SMSes received from and sent to the deceased's phone were informed to SP28, SP30 and were recorded in P18A. SP21 (Chen Phek Cheow) an assistant bank manager from MBB Sungai Siput Branch confirmed that three withdrawals totaling RM4,500 were made through the ATM

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

machine from Teh Wai Tong Savings Account No 158435008148 on 28 April 2007 namely: (a) at 11.44am RM1,500, (b) at 11.45am RM1,500 and (c) at 11.46am RM1,500.

[23] A copy of the photograph taken from the CCTV recorded by the bank ('P123') shows that the withdrawals were made by a person wearing a cap, and a black jacket with his face covered.

29 April 2007

[24] On 29 April 2007, SP26 received from and sent SMS to the deceased's handphone and recorded them in P18A. All the SMSes were informed to SP28 and SP30.

[25] On 29 April 2007 at about 2.20pm. SP3 (Hussain bin Ahmad) a member of the public went to throw rubbish at a rubbish dump at Jalan Felda Lasak Sungai Siput on his motorcycle. He saw a human dead body wrapped in blue cloth and tied with raffia string at the rubbish dump.

[26] He then lodged a police report at Balai Polis Lintang, that is, Lintang Report No 134/07 ('exh P13'). The police personnel who received the report was one L/Kpl Muhammad Khairizal Masri ('SP4'). SP4 then reported to OCS SM Md Noor. SP17 ASP Judy Blacious a/l AF Pereira was informed of the report P13 by the *Bilik Gerakan* Sg Siput.

[27] At 3pm SP17 ASP Judy Blacious instructed L/Kpl Mohd Zaman Jusoh ('SP2') to proceed to the scene to take photographs. At 4.30pm, SP15 (ASP Ooi Chiew Peng) instructed SP16 Sjn Ibrahim Omar to investigate the report lodged. SP16 reached the scene at 5.30pm and SP17 was already there. SP16 and SP17 found a dead body wrapped in a piece of light blue cloth ('P84A') and tied with a yellow raffia string ('P85A') SP17 found that the face of the dead body was half covered by the light blue cloth. SP17 uncovered the face and saw the face full of flies and was slightly smelly. The face was red, had bruises and injuries. At about 6.45pm, the pathologist ('SP18') Dr Mohammad Shafie bin Othman arrived. SP18 found that the dead body was naked and was covered with a long piece of blue cloth. The legs, thighs, waist and chest were tied with raffia string. The corpse was covered with maggots and *ulat* L1. The whole body was hardened and bruises were seen on the front part of the body. There were bruises at the eyes. The skin on the face 'mengelupas'. The dead body was then sent to the Sg Siput Hospital.

[28] At about 8.50pm, SP38 took SP32, SP26 to meet SP17 and SP17 then brought them to the mortuary Hospital Sg Siput for the identification of the

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

dead body. At the mortuary SP26 and SP32 had identified the dead body to be that of Teh Wai Toong through the face and the shape of the body.

[29] At about 10pm, SP18 had conducted a post mortem on the deceased body. The post mortem revealed that:

> si mati telah mengalami kecederaan tulang muka yang menyebabkan pendarahan mengalir masuk ke salur pernafasan dan seterusnya ke dalam paru-paru. Keadaan ini telah menyebabkan si mati mengalami kesukaran bernafas sekaligus membawa kepada kematiannya. Kecederaan di muka si mati yang dialaminya berpunca dari hentakan objek tumpul menggunakan kudrat yang kuat. SP18 juga dapati terdapat kesan lebam pada bawah lidah si mati yang mencadangkan mulut si mati yang disumbat dengan suatu objek. Berdasarkan keadaan mayat si mati, SP18 berpendapat si mati telah mati dalam tempoh di antara 12 hingga 36 jam dari mayat diperiksa di termpat kejadian iaitu dari 28 April 2007 jam 6.45 pagi hingga 29 April 2007 jam 6.45 pagi. Kesan kulit mengelupas pada tubuh badan si mati mencadangkan mayat si mati telah diletakkan di atas suatu objek yang panas seperti lantai yang panas pada waktu tengahari. Tiada terdapat sebarang tanda penyakit biasa yang dilihat boleh menyebabkan atau menyumbang kepada kematian si mati.
>
> Sebab kematian si mati adalah kecederaan muka disertai dengan aspirasi darah.

[30] At the end of the post mortem SP18 had handed down some specimens and exhibits which were taken from the deceased's body to SP17 for further investigation.

1 May 2007

[31] On 1 May 2007 at about 2.45am ASP Samu a/l Subramaniam ('SP20') led a police party to conduct a raid on house No 23, Kampar Avenue Kampar Garden, Ipoh Perak. SP20 and his men searched a room upstairs and arrested the second accused in respect of Chemor Report 886/07 ('exh P125'). SP20 had seized a few exhibits including a red Nissan Sunny car AAS 9476 exh P14 belonging to the second accused. SP20 lodged a report, that is, Pasir Putih Report 1819/2007 ('P112'). When the arrest was made, the second accused put up some struggle. SP20 subsequently handed over the exhibits seized to SP38 for further investigation.

[32] One of the exhibits seized by SP20 from the second accused was a LEVIS wallet ('exh P120A'). The contents of P120A among others are as follows:

(a) IC of the second accused P120A(1);

(b) driving licence of the second accused P120A(2);

(c) 'L' driving licence of the second accused P120A(3); and

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

(d) one bill 'The Store 203, Jalan Kampar' in the name of Teh Wai Toong using the MBB Visa Credit Card No 4539660002142522 dated 21 April 2007 and the time of transaction 12.07 for the value of RM180.66 — P120(4).

[33] At 3pm SP19 Superintendant Shahadan Jaafar led a police party conducting a raid on house No 113 Kampung Bharu Mambang Diawan Kampar. On arrival SP19 found a Honda Civic car ABX 7866 ('exh P34') parked in the porch. The front door of the house was locked.

[34] While outside the house SP19 saw 'bayang seorang' entering a room. They broke open the front door and entered the house. SP19 went straight to the room where he saw the 'bayang orang' entered earlier. In the room, SP19 saw the first accused standing. SP19 straight away arrested him. The police conducted a search in the room and found a Nokia N70 handphone ('exh P19A') under the mattress in the room and several other exhibits. They also found cash of RM4,500 from a drawer of a table in the room. The first accused handed the Honda Civic car key ('exh P107A') to SP19 upon request. SP19 lodged a police report regarding the search, that is, Mambang Diawan Report 194/07 ('P95') SP19 later handed all the exhibits seized together with the Honda Civic car AAX 7866 ('P34') to SP38 at 2am in IPK Perak for further investigation.

[35] At about 2.45pm, SP15 (ASP Ooi) and his men were instructed by SP38 to conduct a search on the Honda Civic car (P34) which was parked in the compound of IPK Perak.

[36] SP15 found various exhibits and also a bunch of keys ('P42A (1–12)') on the dashboard of the car (P34). SP15 handed the bunch of keys to SP38.

4 May 2007

[37] On 4 May 2007 at 3pm, SP38 had interrogated the first accused in his office at Jabatan Siasatan Jenayah IPK Perak in the presence of L/Kpl Hashim and L/Kpl Azmi. The interrogation was conducted in Bahasa Malaysia and Cantonese. During the interrogation, the first accused was willing to show the scene of crime. SP38 then took out a piece of paper and jotted down the questions and answers in that piece of paper ('ID156'). The first accused said he could show the house in Bercham where Tony was detained. After the questions and answers were jotted down, the first accused signed at the bottom of ID156. In ID156, the first accused had said:

alamat saya tidak tahu tapi di kawasan Bercham dan saya boleh tunjukkan.

JOBNAME: No Job Name PAGE: 16 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[38] SP38 also signed on the right hand side at the bottom of ID156.

[39] Based on the information given, SP38 and his police party were brought by the first accused to a house at No 2, Jalan Bercham Utama 17, Taman Utama Bercham Ipoh.

[40] On arrival, SP38 found that no one was in the vicinity of the house. SP38 then instructed SP15 and his team to come to the said house. About 4.45pm SP15 and his men arrived. SP38 then used one of the keys recovered from the dashboard of the Honda Civic car (P42A(1–12)) to open the front gate of the house. The police then entered the compound of the house. SP38 then used the other keys to open the grille and the glass door of the house.

[41] SP38 together with SP15 and his men and the first accused then entered the house.

[42] SP15 and his men proceeded to conduct a search inside the house and managed to find some incriminating exhibits which were subsequently handed over to SP38 for his further investigation.

[43] SP38 and his men spent about two hours in the house. While in the house, SP38 took out a piece of paper and jotted down the questions and answers from the first accused. SP38 asked 'Di mana kereta Tony?' The first accused replied 'alamat tidak tahu tetapi saya boleh tunjukkan di kawasan Bercham' SP38 asked again 'Di mana kunci kereta?' OKT1 answered, 'digantung pada dinding rumah'.

[44] SP38 then found a bunch of key hanging on the wall in the hall. The questions and answers were jotted down in a piece of paper marked ID157.

[45] In ID157, the first accused said:

> Saya tahu Bercham sahaja dan saya boleh tunjukkan.

[46] The first accused and SP38 did sign ID157.

[47] Based on the information given, the first accused brought SP38 and his police party to a back lane of a factory. They found the car and used the key to open the said car door ('P35') in Bercham Industrial area.

7 May 2007

JOBNAME: No Job Name PAGE: 17 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[48] On 7 May 2007 at about 3pm SP25 Dr Muhammad Najib bin Adnan took some blood samples from the first accused and the second accused for DNA analysis. Both the accused were accompanied by SP38 when the blood samples were taken.

10 May 2007

[49] On 10 May 2007, at about 1pm SP24 (ASP Muniandi a/l Paramichivan) was directed by SP38 to bring the second accused to a house in Pasir Puteh and Simpang Pulai to look for a camera and a teddy bear.

[50] SP24 and his police party led by the second accused proceeded to house No 23, Kampar Avenue, Kampar Garden, Ipoh.

[51] In the said house, the second accused took SP24 and his men to the upstairs portion and entered a room. He took a small bag written 'Handy Cam' at the front of the bag ('P29A') and handed it to SP24.

[52] SP24 examined the bag and found a Sony Camera ('P29B') with Serial No 553876.

[53] SP24 then issued a search list in respect of the exh seized ('P126'). After that the second accused led the police party to aother house in Simpang Pulai No 410 Lorong Simpang Pulai 11, Simpang Pulai, Kampung Kepayang, Perak. While in the house, the second accused showed to SP24 his girl friend SP34 Lee Kar Lai.

[54] SP34 then handed a teddy bear ('P31A') to SP24. SP24 seized the teddy bear and issued a search list P127.

[55] SP24 and his police party together with the second accused returned to the police station. SP24 then handed all the exhibits seized to SP38 for his further investigation.

INGREDIENTS OF MURDER

[56] The death of Teh Wai Toong.

[57] His death had been caused by or in consequence of the act of the accused persons.

[58] Such act of the accused was done:

(a) with the intention of causing death: s 300(a) of the Penal Code;

JOBNAME: No Job Name PAGE: 18 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

(b) with the intention to cause such bodily injury as the accused knew to be likely to cause death of Teh Wai Toong: s 300(b) of the Penal Code;

(c) with the intention of causing bodily injury to Teh Wai Toong and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death: s 300(c) of the Penal Code; or

(d) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is like to cause death: s 300(d) of the Penal Code.

INGREDIENTS OF KIDNAPPING

[59] Whoever with intent to hold any person for ransom.

[60] Abducted or wrongfully confined or restrained such person.

[61] A ransom was demanded for the release of the victim.

THE BURDEN ON THE PROSECUTION

[62] Section 180(1) of the CPC provides:

> When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.

What then constitutes a prima facie case? The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 323 described 'a prima facie case' in the following terms:

> A prima facie case is one that is sufficient for the accused to answer, and the evidence adduced must be such that it can only be surmounted by the evidence in rebuttal. The force of that evidence must, if unrebutted, be sufficient to induce a state of belief that the facts as they stand are as stated in the charge. In order to make a finding the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is unrebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain in silent, which if answered in the affirmative means that a prima facie case has been made out. This requires a consideration of the existence of any reasonable doubt in the prosecution's case, which if it exists, cannot lead to the finding of a prima facie case having been made out.

The test and standard of proof required on circumstantial evidence

JOBNAME: No Job Name PAGE: 19 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[63] It is trite law that where the prosecution is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient: *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561.

[64] In other words, the test for circumstantial evidence is this: Whether the effect of all this evidence drives you inevitably, and inexorably to the one conclusion and one conclusion only that it was the accused who intentionally caused the death of the deceased?: see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195.

[65] In fact the irresistible conclusion test was synonymous with the standard of proof beyond reasonable doubt as was held by our Federal Court in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306.

THE DEFENCE'S SUBMISSION

[66] Both the first and second accused have raised numerous issues (which I have considered in their perspective written submissions) at the end of the prosecution case. The various issues raised may be summarised as follows:

(a) there was no direct evidence to link both the accused to the two offences of kidnapping and murder:
on the charge of kidnapping:

(i) the defence submits that there was no eyewitness who saw the deceased being kidnapped;

(ii) the offence of kidnapping is not proved if the victim is not present to the appraisal of the court whether he was forcibly detained or not: see *Public Prosecutor v Ini Abong and other trials* [2008] 8 MLJ 106; [2009] 1 CLJ 526.

(iii) no one saw who sent the SMSes to the complainant SP26;

(iv) no evidence was adduced as to who withdrew the money from the deceased's MayBank account. The recording of the CCTV was not clear; and

(v) the ransom money was not recovered from the first accused,
on the murder charge:

(i) No one actually saw who murdered the deceased and threw his body at the rubbish dump,

(b) circumstantial evidence is not strong enough to point to the guilt of the accused persons:

JOBNAME: No Job Name PAGE: 20 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

The defence submits that since the prosecution relied purely on circumstantial evidence to prove its case against the accused persons, the onus is on the prosecution and is a very heavy one and the evidence adduced must point irresistably to the conclusion of the guilt of the accused: *Lim Hean Chong @ Teo Hean Chong v PP* [2012] 1 MLJ 149; [2012] 2 CLJ 1046. The standard of proof is beyond reasonable doubt and not any higher standard: *Jayaraman Veluyuthan & Ors v Public Prosecutor* [1982] CLJ 464.

The defence further submits that the prosecution failed to adduce sufficient evidence which could point irresistably to one conclusion that is the guilt of the accused persons. The defence has also cast various doubts in the prosecution case:

(i) 'Dolphine' could be the last person who was with the deceased.

The defence submits that SP26 in her police report (exh P132) stated that when the deceased did not return home, she did receive a SMS from the deceased's handphone containing the following message:

> Sorry to make U all worried told mum I will come back today after I meet Dolphin than I come and will reach home

The complainant also told the court that she used the deceased's laptop to look for information about Dolphine. She found that one of his internet friends was called Dolphine. She also found Dolphine's photograph there.

The defence submits that Dolphine could be the last person with the deceased and he could be a very material witness, for the prosecution,

However the investigating officer failed to investigate and failed to produce him as a prosecution witness and the court should invoke s 114(g) of the Evidence Act 1950 against the prosecution.

(ii) there could be the presence of some third parties at the crime scene.

SP27 was one of the chemists who carried out the DNA profiling on the items sent to her for analysis as stated in her chemist report P137. Some of the items analysed are:

> (A) hairs marked T26 (exh P39B), T27 (exh P40B) and T44 (exh P73C(2));
>
> (B) nail clippings marked T20 (P90A) and T21 (P93A);
>
> (C) string marked T23 (P85A);
>
> (D) shorts marked T35 (P64C);

Her chemist report exh P137 shows that:

JOBNAME: No Job Name PAGE: 21 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

The DNA profiles were successfully developed from the above samples except from hair T26, T27 and T44 and bloodstains on nail clippings T20 and T21, cloths T22 and T39 string T23 and shorts T35.

SP27 agreed in cross-examination that a strand of hair in T26 (P39B), a strand of hair in T27 (P40B) and a lot of hairs in T44 (P73C(2)) might come from an unknown person. She also agreed that the nail clippings of T20 (P92A) BS r21 (P93A) and the remaining untested spot of bloodstains on the wrapping cloth T22 (P84A), curtain cloth T39 (P66A) and Mizuno shorts T35 (P64) might also come from an unknown person.

The defence further points out that there were other bloodstains found from the blue cloth which the investigating officer did not cut and sent for DNA profiling. Had he done so, any DNA profiling might reveal the presence of a third party.

The defence therefore submits that all this has cast a reasonable doubt in the prosecution case that there could be others who were present in the house : (see *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 3 MLJ 161; [2008] 4 CLJ 1.)

(iii) who sent the SMSes by using the deceased's phone (P19A) which was recovered from the first accused's room since no finger print dusting was done on the said handphone?

(iv) further, the investigating officer did not send the deceased's handphone (P19A) recovered for examination for handphone donning. The defence submits that the handphone which is alleged to have sent out all the SMSes could have been cloned by a third party;

(v) the prosecution also failed to adduce evidence to prove that the link *www.savelife.com/files674365* which was received by SP26 was registered in whose name. Had the investigating officer carried out the investigation on the link, it might reveal the name of a third party who could be the kidnapper and the murderer;

(vi) the person shown in the picture of the video and the two video recording has not been positively identified by SP26;

(vii) the prosecution failed to investigate the the notices of alibi tendered by both the accused:

The first accused had tendered two notices of alibi exh D161 one covering the murder charge and the other D160 covering the kidnapping charge. The second accused sent one notice of alibi exh D162 covering both the murder and kidnapping charges before the commencement of the trial. Each accused had furnished the name of one alibi witness and the address.

JOBNAME: No Job Name PAGE: 22 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

However the investigating officer failed to investigate or record any statement from the said witnesses.

The defence submits that failure to investigate on the two said witnesses is fatal to the prosecution case as it may well be that the alibi is in fact true in which event the prosecution will either withdraw the charge or offer no evidence in the case; and

(viii) The DNA profiling is silent on the first accused,

(c) other issues raised:

(i) the following complaints were made against the forensic team who was responsible for collecting the items as exhibits from the No 2 Bercham house and the two vehicles ABX 7866 (P34) and AAS 9476 (P14):

(A) there was some delay on the part of the forensic team when they arrived to collect physical evidence from the house and as well from the two vehicles;

(B) the prosecution failed to establish the expertise of forensic team involved in the collection of physical evidence at the crime scene (No 2 Bercham house); and

(C) the head of the forensic team Chief Insp Ooi SP15 testified that not all items of evidence found in the two vehicles were made exhibits of this case. The defence submits that in fact SP15 should have sent all items found for DNA profiling as it would have probably assisted the police to identify the suspects,

(ii) the cause of death:

The defence submits that according to SP18 the pathologist who performed the post mortem on the deceased said the cause of death was 'kecederaan muka disertai dengan aspirasi darah'.

However in cross-examination, SP18 did admit that there were other injuries not necessarily the injuries on the face that had contributed to the death of the deceased.

SP18 also agreed that the facial injuries stated in the third para at p 5 of the post mortem report exh P94 could also have been caused by a forceful fall on a hand surface. It was not possible for SP18 to say that the said injuries sustained by the deceased were inflicted before or immediately after death.

The defence submits that SP18 had left the cause of death open to several inferences;

(iii) identification of the second accused by SP11 and SP12:

The defence submits that the identification of the second accused by SP5, the neighbor, SP7, the landlord's sister, SP9, the lorry driver of Ren Ai Buddhist Association SP11, Jaya Jusco promoter and SP12 the Jaya Jusco cashier are dock identifications.

JOBNAME: No Job Name PAGE: 23 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

The second accused was not identified through any identification parade arranged by the investigating officer. The defence therefore submits that such dock identifications are never reliable;

(iv) DNA Evidence:

The defence submits that according to SP38 only blood specimens were kept in his fridge and all other bloodstained exhibits were kept in his steel cabinet before they were sent for DNA profiling. This fact leads to the possibilities that DNA analysis might have been contaminated and degraded causing the DNA evidence to be unsafe to be relied upon. The defence also submits that the curriculum vitae of SP27 and the evidence of her DNA profiling in court does not show that she is a DNA expert who was competent to do the DNA profiling. The defence therefore submits it is unsafe for the court to accept her evidence;

(v) common intention:

The defence submits that the prosecution failed to prove that the acts of kidnapping and murder were committed by both the accused in furtherance of the common intention of the two. There was no prior concert or a prearranged plan between the two accused to commit the said offences *Muhammad Safaruddin bin Baba & Anor v Public Prosecutor* [2002] 4 MLJ 353; [2002] 4 CLJ 217. The prosecution in fact failed to adduce evidence as follows:

(A) between the two accused who had inflicted the fatal injury which had caused the death as found by SP18 the pathologist;

(B) the prosecution has been unable to point out to any of the two accused who had committed the actus reus on the date, time an place as per charge in order for s 34 of the Penal Code to be invoked; and

(C) there was absolutely no evidence why both the accused wanted to kill the deceased,

(vi) the defence challenged SP37 an expert from the Forensic Department Bukit Aman who had retrieved all the SMSes received by and sent out from the deceased's handphone P19A in two respects, that is:

(A) her expertise, that is, her credentials, experience and training; and

(B) the report prepared by her exh P125 is a computer print out which has not complied with s 90A(2) of the Evidence Act.

THE PROSECUTION'S SUBMISSION

[67] The prosecution submits that the prosecution has adduced sufficient prima facie evidence on each ingredient of the offence of murder and kidnapping respectively.

Murder

JOBNAME: No Job Name PAGE: 24 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

The prosecution had proven:

(a) the death of the deceased, that is Teh Wai Toong through the evidence SP26 and SP32;

(b) the deceased has sustained the following injuries through the evidence of the pathologist that is SP18 as follows:

(i) si mati telah mengalami kecederaan tulang muka yang menyebabkan pendarahan mengalir masuk ke salur pernafasan dan seterusnya ke dalam paru-paru;

(ii) keadaan ini telah menyebabkan si mati mengalami kesukaran bernafas sekaligus membawa kepada kematiannya;

(iii) kecederaan di muka si mati yang dialaminya berpunca dari hentakan objek tumpul menggunakan kudrat yang kuat;

(iv) SP18 juga dapati terdapat kesan lebam pada bawah lidah si mati yang mencadangkan mulut si mati yang disumbat dengan suatu objek;

(v) berdasarkan keadaan mayat si mati, SP18 berpendapat si mati telah mati dalam tempoh di antara 12–36 jam dari mayat diperiksa di tempat kejadian iaitu dari 28 April 2007 jam 6.45 pagi hingga 29 April 2007 jam 6.45 pagi;

(vi) tiada ditemui sebarang tanda penyakit biasa yang dilihat boleh menyebabkan atau menyumbang kepada kamatian si mati.

(c) the cause of death was 'kecederaan muka disertai dengan aspirasi darah'.

SP18 the pathologist was of the opinion that 'hentakan dengan menggunakan satu batang cota (P50A) boleh menyebabkan kecederaan muka dan kecederaan dalaman'. and

(d) SP18 was also of the opinion that the said injuries 'kecederaan muka si mati disertai dengan aspirasi darah' would in the ordinary course of nature to cause death.

The prosecution therefore submits that the third element of murder has been proved that is, culpable homicide is murder if it is done with the intention to cause injury which is sufficient in the ordinary course of nature to cause death.

Kidnapping

[68] The prosecution also submits that it has established sufficient prima facie evidence that the deceased had been kidnapped that is forcibly restrained based on the evidence adduced through SP26 and the SMSes received by her:

(a) after the deceased did not return home, SP26 received SMSes from the deceased's handphone stating that the deceased was in the hand of the suspect. Her evidence was supported by video pictures sent by the suspect

JOBNAME: No Job Name PAGE: 25 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

showing that the deceased's face was covered partly and was in the position of being tied; and

(b) the subsequent SMS-SMSes also demanded for a ransom money of RM200,000 for the release of the deceased. Some of the SMSes received by SP26 are as follows:

(i) 'Get ready RM200K by tomorrow nite. I shall inform u again'.

SMS received on 26 April 2007 Jam 10.04 pagi

(ii) 'Later I will send the website to you. Mean while, you transfer RM5K to Tony Maybank Account today so that he will have food to eat'.

SMS received on 26 April 2007 Jam 10.11 pagi.

(iii) 'Pay earlier, sure he can have food to eat earlier. Today bank in RM5K and mean while get ready RM200K cash all in old RM100 note that number must not in sequence'.

SMS received on 26 April 2007 Jam 10.20 pagi.

(iv) 'I demand RM.5K, u give RM1K. How about I give you Tony finger first?'

SMS received on 26 April 2007 Jam 3.52 petang.

The prosecution submits that all the ingredients of the offence of murder and kidnapping have been satisfied. The prosecution is now left with the burden to prove it was the first and second accused who having acted in furtherance of the common intention had kidnapped the deceased and then demanded a ransom money of RM200,000 and subsequently murdered him.

The prosecution has relied on circumstantial evidence to prove that it was the first and the second accused who had actually perpetrated the said two offences. The prosecution submits that it has established the following circumstantial evidence against both the accused persons

The first and second accused were the sole occupants of the No 2 Bercham house

[69] The first and second accused rented a house at No 2, Laluan Bercham Utara 17, Bercham, Ipoh from SP6 and SP7 on 9 April 2007. SP6 and SP7 confirmed that the first accused was the person paying the rental whereas the second accused was the one who signed the tenancy agreement ('ID15'). SP5 a neighbour who stayed next door had identified both the accused as the occupants of the said house. On the issue of identification, the prosecution told the court that SP6 had identified without doubt in court and through an identification parade. SP6 had seen the first and second accused on a few occasions before the trial. SP5 and SP6 had identified also both the accused in

JOBNAME: No Job Name PAGE: 26 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

court. The prosecution submits that identification is proved. The prosecution has further adduced evidence through SP10 a worker of Recycle Department Ren Ai Association Ipoh that the two chairs with the cushions (exh P21A, P21B, P22B(2), P23A, P24B(1–2), P25A and P26A) which were found in Bercham house were the ones sold by him to the second accused. The said chairs and cushions were delivered by SP9 to the second accused in the house.

[70] From the evidence adduced through SP5, SP6, SP7, SP9 and SP10, it is proven beyond reasonable doubt that the first and second accused are the sole occupants of the house.

Knowledge of the existence of the exhibits recovered by the police.

[71] The first accused after being interrogated by SP38 had given some information which had been jotted down by SP38 on a piece of paper marked ID156. The first accused then led a police party headed by the investigation officer SP38 to the said rented house in Bercham. SP38 then by using the bunch of keys P42A(1–12) which was earlier recovered by SP15 from the dashboard of the first accused's Honda Civic car AAX 7866 (P34) managed to open the gate, the grill and the door to enter into the house.

[72] A search was conducted by SP15 and his team in the said house and the following incriminating evidence were found therein:

(a) one knife — T30 — P51A;

(b) one handcuff — T31 — P60A;

(c) plastic strings — T32 — P62A;

(d) cushion covers — T37(A) — P25A, T37(B) — P26A and T36(A) — P23(A);

(e) towel — T34 — P63A;

(f) stands of hair — T40 — P69AT41 — P70AT42 — P71A;

(g) a Mizuro pants — P64C;

(h) three credit cards Petronas payment receipts in the name of Teh Wai Thong — P57B (1–3);

(i) one Tejani Medical Service Sdn Bhd receipt in the name of Teh Wai Thong — P57F; and

(j) one roll of lue colur cloth — P27B.

[73] While in the house, SP38 had interrogated the first accused and the first accused had given some information which SP38 had recorded on a piece of paper marked as ID157. SP38 asked the first accused where the deceased's car key was. The first accused told SP38 the car key was hung on the wall of the

JOBNAME: No Job Name PAGE: 27 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

house. SP38 took the car key from the wall. The first accused then led SP38 and his men to the recovery of one Hyundai Elantra car AEJ 6928 belonging to the deceased which was parked at the back lane of a factory in Bercham industrial area. SP38 managed to use the key found in the rented house in the No 2 Bercham house to open the car door.

[74] The prosecution submits that although the two information leading to discovery which were recorded in ID156 and ID157 were rejected by the court on the ground that they failed to satisfy the requirement of s 27 of the Evidence Act 1950 the subsequent conduct of the first accused in leading the police to the recovery of the incriminating evidence found in the rented house in Bercham, the car key hung on the wall of the house and the recovery of the deceased's car P75 at the back lane of the factory, is admissible under s 8 of the Evidence Act 1950. The learned deputy public prosecutor cited the Federal Court case of *Amathevelli a/p R Ramasamy v Public Prosecutor* [2008] 3 MLJ 782; [2008] 4 CLJ 413. The prosecution submits that the subsequent conduct of the first accused which led the police party to the recovery of the exhibits shows that he knew about the whereabouts of these exhibits.

The analysis of the two chemists SP27 and SP29

[75] The analysis of SP27 reveals that:

(a) a common male DNA was developed from hairs T43 — P72 and bloodstains on knife T30 — P51A, handcuff T31 — 60A, string T32 — P62A, cushion cover T37(A) — P25(A) — P25A and T37(B) — P26A which matched with the DNA profile developed from bloddstaines specimen T18(A) (labeled Teh Wah Thong)–P thus indicating that the DNA identified originated from the same source. The probability of a randomly selected unrelated individual having this matching DNA profile is approximately 1 in 130 quadrillion (130 x 10 15) as calculated based on the Malaysian Chinese population database;

(b) the partial male DNA profile developed from bloodstains on towel T34 — P63A (at 13 loci), cushion cover T36(A) — P23A (at 18 loci) and swab T38 — P65A (at 18 loci) were consistent with the DNA profile developed from bloodstained specimen T18(A) — P (labeled Teh Wah Thong);

(c) a common male DNA profile was developed from hairs T40 — P69A and T42 — P71A which matched with the DNA profile developed from bloodstained specimen T25(A) — P140 (labeled Yan Wai Seng) thus indicating that the DNA identified originated from the same source. The probability of a randomly selected unrelated individual having this matching DNA profile is approximately 1 in 4.0 quantillion (4.0 x 10 18) as calculated based on the Malaysian Chinese population database; and

(d) the partial male DNA profile (at 14 loci) developed from hairs T41 — P70A was consistent with the DNA profile developed from bloodstained specimen T25(A) — P140 (labeled Yan Wai Seng).

JOBNAME: No Job Name PAGE: 28 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[76] The analysis of SP29 reveals that:

(a) for these two pieces of cloth that is, P84A and P27B, I find that (a) one end of P84A forms a complimentary fit with another end of P27B. *SP29 berpendapat sedemikian kerana* 'cutting pattern' *yang* match between the two *serta garisan yang selari dan* match *di antara kedua-dua kain itu dan lebar kedua-dua kain adalah sama. Ini adalah fakta* significant *yang membawa kepada pendapatan yang tersebut di atas;* and

(b) *P27B adalah kain biru yang ditemui membaluti si mati di tempat mayat dijumpai. Manakala P84A adalah satu gulungan kain biru yang ditemui di dalam rumah No 2 Laluan Bercham Utara 17, Bercham, Ipoh, Perak, semasa pemeriksaan oleh SP15 di situ. Ini menunjukkan kain-kain biru itu adalah dari jenis yang sama.*

[77] The prosecution submits that:

(a) the presence of the deceased's DNA profile in the exhibits recovered by SP15 from the No 2 Bercham house namely:

(i) knife T30 (P51A);

(ii) handcuff T31 (P60A);

(iii) plastic strings T32 (P62A);

(iv) cushion covers — T37A (P25A) T37B (P25B);

(v) towel T34 — P63A;

(vi) cushion Cover T36A — P23A; and

(vii) swab — T38 — P65A.

together with the documents bearing the deceased's name and the Mizuno shorts P64C which was identified by SP26 to be belonging to the deceased clearly show that the deceased was in the said rented house and was tied and handcuffed,

(b) the presence of the second accused's DNA profile from hairs T40 — P69A and T42 — P71A recovered from the rented house also show the presence of the second accused in the said house; and

(c) the fact that the end one piece of cloth P84A which was used to wrap the deceased's body at the rubbish dump forms a complimentary fit with another end of another roll of blue cloth P27B found in the rented house shows a close link of the deceased's body with the occupants of the rented house, that is, the first and the second accused.The prosecution urged the court not to doubt the expertise of both the chemists SP27 and SP29 as they are competent to carry out the analysis based on their credentials and experience.

JOBNAME: No Job Name PAGE: 29 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

The roll of blue cloth P84A was taken from Recycle Department Ren Ai Association where the first accused was working

[78] The prosecution has further established through SP10 that the roll of blue cloth P84A found in the rented house was one of the rolls of blue cloth which were placed in the Recycle Department Ren Ai Association where the first accused was working as a supervisor. This piece of evidence has further linked the first accused to the deceased's body found at the rubbish dump.

The recovery of the deceased's handphone from the first accused's room

[79] A Nokia N70 handphone ('P19A') was recovered from the room where the first accused was present when a search was conducted by SP19 and his men in the said room. The said handphone number was 012-5226543. The deceased's younger sister SP26 confirmed that the said handphone belonged to the deceased. A witness from Maxis Mobile Sdn Bhd that is SP33 also confirmed that the said handphone number 012-5226543 was registered at the material time under the name of Teh Wai Toong that is the deceased. SP8 from Syarikat Exclusive Telecommunication Sdn Bhd confirmed that the said handphone exh P19A was sold by her to the deceased on 17 April 2006. A sale Receipt No 197957 of the said handphone issued by Syarikat Exclusive Telecommunication Sdn Bhd was tendered as exh P16.

[80] On the issue that the deceased's handphone P19A should have been sent for finger print dusting and for examination to determine whether the deceased's handphone had been cloned, the prosecution submits that all this is not necessary because the handphone was found in the accused's room. The fact that the deceased's handphone was found with him clearly show that he had access to the phone.

The SMSes retrieved from the deceased's handphone P19A tallied with the SMSes recorded by SP26, SP28 and SP30 in the book marked exh P18A

[81] SP37 an expert from the Forensic Department Bukit Aman had retrieved all the SMSes received by and sent out from the said handphone exh P19A. The said SMSes tallied with the SMSes recorded by SP26, SP28, SP30 and SP31 in the book marked as exh P18A.

[82] In reply to the challenge on the expertise and on the admissibility of exh P125, the prosecution submits that from the evidence adduced on his credential, experience and training, it is clear that SP37 is an expert in his field. As regards whether P125 need to comply with s 90A(2) of the Evidence Act 1950 the prosecution submits that s 90A(2) is not applicable since it is a report prepared by SP37 himself.

JOBNAME: No Job Name PAGE: 30 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

Evidence showing the second accused was using the deceased's credit card to make purchases in jaya Jusco Supermarket Ipoh on 21 April 2007 and 22 April 2007

[83] SP11 a promoter from Jaya Jusco Ipoh told the court that on 21 April 2007 about 3pm one male Chinese came to purchase a handicam Sony ('P29B') plus other items from her. She opened up one cash memo ('P28B') and passed it together with the items purchased to the cashier SP12. The male Chinese was making payment by using a credit card. SP12 kept the credit card slip signed by the male Chinese ('P28A').

[84] On 22 April 2007 at about 12 noon the same male Chinese came to SP11 again, this time to purchase a Sony Digital Camera ('P31A') she then issued a cash memo P28D and handed in together with the Sony Digital Camera to SP12 the cashier. SP12 confirmed that the male Chinese was using a visa credit card in the name of Teh Wah Toong. SP12 kept the credit card slip signed by the male Chinese ('P28C').

[85] Another salesgirl SP22 also confirmed that two summary journal records P28E and P28F show that two payments were made by the second accused using the visa credit card with the account number 453966000214522 on 21 April 2007 and 22 April 2007. Both SP11 and SP12 had identified the second accused as the male Chinese who came to make the said purchases on 21 and 22 April 2007 using the credit card of Teh Wah Toong.

[86] SP11 told the court that she could identify the second accused because the second accused came to Jaya Jusco to make purchases on two consecutive dates that is 21 and 22 April 2007 wearing the same black cap and a faded blue colour jacket. They were standing at close distance about 1–2ft away. She also spent time explaining to the second accused on the usage of the handicam.

[87] SP12 also said she could identify the second accused as the male Chinese who was referred to her counter for payment by SP11 on two consecutive dates that is 21 and 22 April 2007. On each day the second accused was wearing the same black cap and a faded blue colour jacket. SP12 said the male Chinese was an adolescent and without a mustache. SP12 confirmed that she could see the second accused clearly.

[88] The prosecution submits that SP11 and SP12 have positively identified the second accused.

[89] ASP Samu SP20 had recovered from the second accused's wallet a receipt P120A(4) 'The Store 203 Kampar' in the name of Teh Wai Toong using the MBB Visa No 4539660002142522 dated 21 April 2007 and time 12.07

JOBNAME: No Job Name PAGE: 31 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

for the sum bor RM180.66. All the above evidence clearly shows that the second accused had access to the deceased's credit card on 21–22 April 2007 when the deceased did not return home.

The recovery of the handycam Sony P29B and the teddy bear P21A

[90] The second accused had led the police party to the recovery of (a) one Handycam Sony Serial No 553876 (exh P29B) which he purchased from SP11 on 21 April 2007 from house No 23, Kampar Avenue Kampar Garden, Ipoh. (b) one teddy bear (P31A) which he purchased from SP12 on 22 April 2007. The Handycam Sony (P29B) has been identified by SP11 through its Serial No 553878-K which she had jotted down in the cash memo (P28B) issued by her. The said teddy bear P31A had been identified by SP12 as the one sold to the second accused.

The person in all the three CDs marked P134E, P134G and P149 was positively identified by SP26 to be the deceased.

[91] P149 was a CD retrieved from the deceased's handphone exh P19A. The content of the CD was a picture of a male person who was identified by SP26 to be the deceased.

[92] SP26 had down loaded a video clip sent by the suspect and she managed to switch on her computer and saw the video clip. She then burned the video clip into two CDs (exhibits P134E and P134G).

[93] The person in the video clip in the two CDs looked like the deceased. SP26 confirmed that the picture of the person in all the three CDs that is P134E, P134G and P149 was the picture of the deceased.

Whether there was any delay in collecting the physical evidence by the forensic team led by SP15

[94] The prosecution submits that the evidence adduced shows clearly that there was no delay at all on the part of the forensic team in collecting the incriminating items found from the Bercham house. Neither was there any delay on the part of the investigating officer SP38 in sending the exhibits for DNA profiling. There was also no evidence to show that any of the blood stained exhibits which were sent to the chemist for DNA profiling had been contaminated.

Whether the cause of death was open to several inferences

JOBNAME: No Job Name PAGE: 32 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[95] The prosecution submits that SP18 the pathologist had clearly stated the injuries sustained by the deceased and gave his opinion based on the deceased's body examined by him at the rubbish dump, that the death could have occurred that is, 12–36 hours prior to the time the dead body was examined at the crime scene that is, from 28 April 2007 at 6.45am to 29 April 2007 at 6.45am.

[96] SP18 had stated that the cause of death to be 'Kecederaan muka disertai dengan aspirasi darah'.

[97] He was also of the view that 'hentakan dengan menggunakan satu batang kayu cota P50A boleh menyebabkan kecederaan muka dan kecederaan dalaman yang dialami oleh si mati'. He also gave his opinion that 'kecederaan muka disertai dengan aspirasi darah' could in the ordinary course of nature to cause death.

Common intention

[98] The prosecution submits that the circumstantial evidence clearly shows that the first and the second accused had played their respective roles in committing the said two offences in furtherance of the common intention of both the accused.

EVALUATION OF EVIDENCE ADDUCED BY THE PROSECUTION AND FINDINGS OF FACTS BY THE COURT AT THE END OF THE PROSECUTION CASE

Having carefully considered the evidence adduced by the prosecution at the end of the prosecution case and having subjected the said evidence to a maximum evaluation test, I am satisfied that the prosecution has proven the following ingredients

[99] In respect of the murder charge:

(a) the death of the deceased, that is Teh Wai Toong, the injuries sustained by the deceased and the cause of death that is, 'Kecederaan muka disertai dengan aspirasi darah' through the evidence of the pathologist SP18;

(b) the identity of the deceased that is 'Teh Wai Toong' through the evidence of the deceased's sister SP26 and his father SP32; and

(c) the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause death: s 300(c) of the Penal Code.

[100] In respect of the kidnapping charge:

JOBNAME: No Job Name PAGE: 33 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

(a) the deceased had been wrongfully confined or restrained with intent to hold him for ransom and a ransom of RM200,000 was demanded for the release of the deceased through the evidence of SP26 and the SMSes received by SP26 from the deceased's handphone and the video pictures sent showing the deceased's face was covered partly and was in a position of being tied.

Circumstantial evidence

[101] The only issue left is whether the prosecution had established sufficient circumstantial evidence to prove that it was the first and the second accused persons who, in furtherance of the common intention of both had kidnapped the deceased and subsequently murdered him.

[102] Having perused the evidence established by the prosecution at the end of the prosecution case I am satisfied that all the circumstantial evidence as elaborated from paras 69–93 had been successfully established beyond reasonable doubt by the prosecution. I find that the prosecution had proved beyond reasonable doubt that it was both the accused persons who had kidnapped and murdered the deceased in furtherance of the common intention of both of them. I find that all the circumstantial evidence has driven the court inevitably and inexorably to one and only one conclusion, that is, both the accused persons were the pepertrators of the said two offences.

Common intention

[103] The law on common intention has been correctly stated in the following cases:

> It is trite that in order to invoke Section 34 of the Penal Code common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proof either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention:

See *(1) Namasiyiam (2)Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336.

> Thus to attract Section 34 of the IPC two postulates are indispensable; (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons. Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the

JOBNAME: No Job Name PAGE: 34 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

> strength of Section 34 of the IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only covert act it is enough, provided such a covert act is proved to have done by the coaccused in furtherance of the common intention:

See the judgment of Thomas J in *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344 quoted by the Court in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466

[104] I am satisfied that the prosecution has established beyond reasonable doubt by way of circumstantial evidence that it was the first and the second accused who had wrongfully and forcibly confined or restrained the deceased and demanded for a ransom of R200,000 and subsequently murdered the deceased in furtherance of the common intention of them both.

[105] The circumstantial evidence points only to one conclusion that both the accused were involved in the said criminal transaction of kidnapping and murdering the deceased person. The circumstantial evidence also shows that they were the only perpetrators of the said two offences. It is therefore immaterial whether who amongst the two who abducted the deceased and who actually inflicted the injuries which had caused the death of the deceased.

Failure to investigate the alibi notice

[106] I do not agree with the submission of learned counsel for the first accused that failure of the investigating officer in investigating the witnesses named in the said notices has cast a reasonable doubt in the prosecution case.

[107] I find that this is a case where there was overwhelming circumstantial evidence to prove that it was the two accused persons who had committed the said two offences. I am of the view that failure of the investigating officer to interview the alibi witnesses would not cast any doubt in the prosecution case.

The character of 'Dolphine'

[108] SP26 did tell the court that she did lodge a police report that she had received a SMS from the deceased's handphone after he had gone missing that the deceased would come back after he met Dolphine. She also said that she had checked the laptop of the deceased and found that Dolphine was an internet friend of the deceased. Learned defence counsel submits that s 114(g) of the Evidence Act 1950 should be invoked against the prosecution for not calling Dolphin as a witness. With respect, I do not agree with such a submission.

JOBNAME: No Job Name PAGE: 35 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[109] First and foremost only the name 'Dolphine' without any particulars was mentioned in the SMS received by SP26 from the deceased's handphone. Although SP26 told the court that Dolphine was an internet friend of the deceased, I still find that failure to call Dolphine as a witness will not affect the prosecution case at all firstly because all the circumstantial evidence has established only the first and the second accused were involved in this case and had left no gap in the prosecution case.

[110] Secondly, the said message received by SP26 was probably sent by the suspect for the following reasons:

(a) the SMS which informed SP26 that he would come home at 9.30pm after seeing Dolphine was received by SP26 on 23 April 2007 between 4pm and 5pm. There is no reason why the deceased could not phone his own sister SP26 informing her the reason why he could not come home instead of communicating by way of SMS as SP26 had made various attempts to phone the deceased but no one picked up the calls;

(b) when SP26 received the SMS that the deceased would come home only at 9.30pm after seeing Dolphine, she immediately replied the SMS that she would report to the police if she did not see him by then. About two hours later, SP26 received a phone call from the suspect warning her not to report to the police as the deceased was in his hand. The above facts clearly show that the message about the deceased seeing Dolphine was not sent by the deceased but by the suspect who received the warning reply by SP26; and

(c) the fact that the deceased's credit card had been used by a third party (the second accused) to makes purchases in Jaya Jusco Supermarket in Ipoh on 21–22 April 2007 also shows that probably the deceased had already fallen into the hand of the suspect.

DNA evidence

[111] I find that the challenge by the defence on the expertise of the two chemists who carried out the DNA profiling is totally without basis as I find that they are competent to testify as experts in their specialised fields based on their academic qualification and experience that they each possess, and the courses and training they had undergone.

[112] I also find that the allegation of delay on the part of the forensic team in collecting the physical evidence from the crime scene is also without merit as the evidence adduced by the prosecution does not show otherwise.

JOBNAME: No Job Name PAGE: 36 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[113] On the issue of the possibilities of those bloodstained exhibits which were not kept in the fridge which might have been contaminated and degraded thus causing DNA evidence unsafe to be relied upon, I also find such a contention without merit.

It is to be noted that SP27 and SP29 were the chemists who conducted the DNA profiles on the exhibits sent. They did not testify that any of the exhibits sent for the DNA profiling had been contaminated. The court therefore should not question their findings.

Evidence of SP37

[114] I also find that the attack by the defence on the expertise of SP37 in extracting evidence from the deceased's handphone exh P19A is also without merits as I am satisfied that he is an expert in his field based on the facts that he did possess a Diploma in Engineering, he had been issued with certificate by XRY Video Investigator and Eucase Software when he attended the courses.

[115] The datas which had been extracted by SP37 were contained in a report prepared by him in P125.

[116] I find that P125 contains the results of his extraction from P19A and s 90A of the Evidence Act is not applicable.

Identification of the second accused by SP11 and SP12

[117] I am satisfied with the dock identification of the second accused by SP11 and SP12, the promoter and the cashier of Jaya Jusco Ipoh respectively.

[118] According to SP11, she said she could identify the second accused because he came on two consecutive days that is 21–22 April 2007 to make some purchases from her in Jaya Jusco Ipoh. Firstly, she said the second accused was wearing the same black cap, and a faded blue colour jacket. She said she could see the second accused clearly although the incident happened four years ago. She said she spent time explaining to the second accused how to operate the handicam which the second accused purchased. They were at a close distance of 1 to 2 feet. SP11's evidence was corroborated by SP12's evidence. According to SP12, she could identify the second accused as a Chinese teenager with his hair above his neck and without mustache. She said she could identify the second accused as the second accused came on two consecutive dates wearing a black cap and a faded blue colour jacket.

[119] I find that the evidence of SP11 and SP12 was never shaken at all. I have no reasons not to believe them as they have no reasons to tell lies in court.

JOBNAME: No Job Name PAGE: 37 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[120] Although SP11 and SP12 only identified the second accused through dock identification, I find that such a dock identification based on the reasons given by them is proper and can be safely accepted.

On the admissibility of information leading to discovery under s 27 of the Evidence Act 1950

[121] The prosecution sought to admit information underscored as contained in ID156, ID157, ID151 and ID152 under s 27 of the Evidence Act 1950:

(a) ID156 — contains information given by the first accused in the form of questions and answers as follows which led the police party to the recovery of the No 2 Bercham house and the incriminating exhibits found therein:

> (a) Tony adalah orang yang dicolek dan dikurung.
>
> (b) Di mana rumah Tony dikurung?
>
> Alamat saya tidak tahu tapi di kawasan Bercham dan saya boleh tunjukkan.

(b) ID157 contains information underscored given by the first accused in questions and answers form while in the No 2 Bercham house which led the police to the recovery of the deceased's car Hyundai Elantra:

> S: Kunci ini kunci apa?
>
> J: Ini kunci Hyundai Elantra.
>
> S: Ini kereta siapa?
>
> J: Kereta Tony
>
> S: Di mana kereta Tony?
>
> J: Saya tahu Bercham sahaja dan saya boleh tunjukkan.

[122] ID151 is a report lodged by the investigating officer SP38 after the first accused had led the police party to the said No 2 Bercham house where the deceased was alleged to have been kidnapped and detained.

[123] ID152 is a report lodged by the investigating officer SP38 after the first accused had brought the police party to the recovery of the deceased's car Hyundai Elantra Registration No AEJ 6929 in a back lane of a factory in light industrial area in Bercham.

[124] In seeking to admit the underscored information contained in ID156, 1D157 and the two police reports ID151 and ID152, the prosecution submits that it is clear that for information leading to discovery of a fact or thing to be

JOBNAME: No Job Name PAGE: 38 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

admissible under s 27 of the Evidence Act 1950 there is no duty on the prosecution to establish the voluntariness of the information. It cited the Court of Appeal case in *Amathevelli a/p R Ramasamy v Public Prosecutor* [2009] 3 MLJ 782; [2008] 4 CLJ 413 at p 425 to support its contention. The prosecution further submits that it is clear from the authorities that for evidence to be admissible under s 27 of the Evidence Act 1950 there must first be evidence of information given by an accused in custody and that information must be given before the discovery of the fact and such information must relate to the fact discovered: see *Kathavarayan a/l Munisamy v Public Prosecutor* [2009] 1 MLJ 837; [2009] 1 CLJ 125(CA) .

[125] The prosecution submits that the facts adduced by the prosecution clearly show that all the ingredients of s 27 had been fulfilled.

[126] The main contentions of learned defence counsel for the first accused may be summarised as followed:

(a) the information had not been obtained voluntarily on the ground that the first accused was assaulted, was not given food and drinks and was handcuffed;

(b) the words 'Tony adalah orang yang diculik dan dikurung' and 'alamatnya tak tahu tapi di kawan Bercham dan saya boleh tunjukkan' do not relate to the discovery of the objects; and

(c) the objects discovered did not possess the characteristics of being hidden or concealed: *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401.

[127] Having scrutinised the facts adduced and the submissions of both parties, I agree with the submission of the prosecution that voluntarinous of the information is not an element to be satisfied in determining the admissibility of information under s 27 of the Evidence Act 1950.

[128] However, I ruled that ID156 inadmissible on the following grounds:

(a) the information given by the first accused does not distinctly relate to what was discovered, that is, the house and the incriminating articles found therein; and

(b) the finding of the No 2 Bercham house does not have the characteristic of being hidden. I am of the view that the said house could have been found by the police with a proper investigation even without the assistance of the first accused.

JOBNAME: No Job Name PAGE: 39 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[129] I also ruled that ID157 inadmissible for the same reason that the element of concealment had not be fulfilled in that the said car was not concealed and could have been found easily by a proper investigation on the part of the police.

[130] I also ruled that the two police reports lodged after discovery that is, ID151 and ID152 are inadmissible on the following grounds:

(a) since I have ruled that information contained in ID151 and ID152 inadmissible, it must also follow that the same information which were reduced into writing after discovery in ID151 and ID152 are also not admissible; and

(b) the two police reports ID151 and ID152 apart from containing the information as contained in ID156 and ID157 respectively also contain other information which was lodged by SP38 after all the episode was over. Such reports do not have much evidential value.

[131] Be that as it may, I am of the considered view that the inadmissibility of the information supplied by the accused does not affect the admissibility of the evidence of his subsequent conduct under s 8 of the Evidence Act irrespective of s 27: see *Amathevelli a/p R Ramasamy v Public Prosecutor* [2009] 3 MLJ 782; [2008] 4 CLJ 413.

[132] I agree with the submission of the prosecution that the subsequent conduct of the accused in leading the police party to the recovery of the house and the incriminating articles found therein and the recovery of the deceased's car key from the wall of the Bercham's house as pointed out by the first accused which led to the recovery of the deceased's car in the back lane of a factory in the industrial area in Bercham in respect of the first accused and also the recovery of the items purchased from Jaya Jusco Ipoh in respect of the second accused are all subsequent conducts which are admissible under s 8 of the Evidence Act 1950 who go to show that the accused persons had knowledge of the existence of such exhibits.

DECISION AT THE END OF THE PROSECUTION CASE

[133] Based on the evidence adduced at the end of the prosecution case I find that the prosecution has established a prima facie case, that is, on the standard of beyond reasonable doubt on the charge of kidnapping as well as the charge of murder against both the accused persons.

[134] I therefore call upon the first and the second accused to enter their respective defence.

JOBNAME: No Job Name PAGE: 40 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

The alibi notices

[135] The defence is only allowed to call alibi witnesses as stated in their respective notices of alibi in respect of the murder charge.

[136] As regards notice of alibi for the kidnapping charge since the prosecution had earlier made an application to amend the date in the kidnapping charge in the midst of the trial after calling seven witnesses that is, from '20.4.2007' to '20.4.2007 to 26.4.2007' and the court allowed the amendment and ruled that the notice of alibi on the kidnapping charge is still valid and the defence need not file a fresh notice of alibi by allowing the defence to adduce alibi defence covering those dates not mentioned in the notice of alibi and to recall SP1 and SP7 who had testified for further cross-examination pertaining to the amended charge ('P2A') I will now therefore allow the defence to submit a list of witnesses to the prosecution covering those dates that is 21–26 April 2007 not mentioned in the original kidnapping charge ('exh P2') if any on or before 17 August 2012 and I also allow the prosecution more than ten days to investigate if any new names of witnesses are submitted.

DEFENCE

[137] The three alternatives had been explained to the accused. Both the accused elected to give the evidence upon oath.

Defence of the first accused

[138] The first accused told the court that from 20–29 April 2007 he was staying in his Kampar house with his mother. That house was registered in three persons' names, that is, he himself, his brother Chew Wai Luen and his mother Fong Nam Tai.

[139] The first accused admitted that he and the second accused rented the No 2 Bercham house Laluan Bercham Utara 17, Taman Utama Ipoh. They used the house to repair and service computer and as storage. Customers did not come to the No 2 Bercham house. Whenever he received any computer for repair from Ipoh area he would send it to the No 2 Bercham house for repair. They did not stay in the house overnight. The second accused was helping him in repairing and servicing the computers in the house. No company was registered in their names.

[140] The first accused told the court that he knew the deceased Tony Teh Wai Toong through a friend called Dolphine since 2005 ('Tony'). He knew Dolphine through internet. He did not know how long Dolphine had known

JOBNAME: No Job Name PAGE: 41 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

Tony. Tony never came to his No 2 Bercham house for his computer servicing and repairing. He would normally go to Kampar for his computer servicing and repair.

[141] Dolphine was a customer of the first accused. He came to the first accused's house in Kampar for his computer servicing and repair around ten times.

Alibi defence

[142] The first accused said from 20–29 April 2007, he was staying with his mother in his Kampar house. His brother was then staying in Kuala Lumpur:

(a) on 20 April 2007, he and his mother went to bed at 11pm. His mother was a heart patient. They were sleeping in the hall. He had to ensure that his mother was not having any difficulty in breathing when she was asleep.

on 21 April 2007, the first accused said he got up at about 6 something in the morning. He did his morning exercise, washing up and taking his mother to the market. After breakfast, they came back to the house to do some house cleaning.

After lunch, he took his mother to treat a patient in Kampar. His mother was a Chinese physician. He was with her mother while the mother was treating the patient for two hours. He said he had to learn from his mother and get more experience as he was also studying some Chinese medical course.

After that they returned home. He said he remembered he did some assignment for his medical course. His medical course was organised by Bhodi Medical Centre in Ipoh. The first accused said he could not recall whether he went to the customer's house for computer servicing on that day. He went to bed at about 11pm.

He said he did not record his movement on 21 April 2007. However he said his movements on 21 April 2007 was actually his daily routine.

(b) 22 April 2007:

He said 22 April 2007 was a Sunday. He woke up as usual and did his routine things.

At about 8am, he took his mother to Ren Ai Buddhist Welfare Association in Ipoh to see and treat patients from 9am to 4.30pm

JOBNAME: No Job Name PAGE: 42 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

He was with his mother throughout the duration. The treating of patients in Ren Ai Association was a voluntary job.

They had a meeting with EXCO members in Ren Ai Association from 5–7pm After the meeting they had dinner in Ipoh. Then they went home. They reached home at about 9pm and washed up and went to bed at the same time.

He also told the court that from 20–29 April 2007, he did go out at night on 24–26 April 2007 to attend his night classes from 7.30–10pm regarding his medical course in Ipoh. He left his house in Kampar at 6 something in the evening for his night classes and returned home at about 11pm.

The first accused also told the court that he was a voluntary worker as the head of the Recycle Department in Ren Ai Association. He employed workers to collect all donations like recycled items and sold them. He was only paid petrol allowance. Besides being the head of the Recycle Department he also helped the EXCO members to submit documents for renewal of licence to the registrar of societies and for the contributions for EPF and SOCSO for the workers. He said from 21–29 April 2007, he went to Ren Ai Association only once pertaining to his job as head of the Recycle Department.

(c) 23 April 2007:

He worked up as usual and did his routine things. After breakfast he sent his mother to Temoh Buddhist Association to treat patients from 9am to 4.30pm He mother was paid allowances for the services rendered. He said he was with the mother throughout the entire period.

After 4.30pm, they went back to Kampar and had dinner together. At 8pm he went out to play badminton until 10pm. He said he could remember he went out to play badminton because it was part of his daily routine activities on Monday although he did not keep any records.

(d) 24 April 2007:

As usual, after waking up at about 6 something in the morning, and doing all the morning chores, he sent his mother to Yee Ching Association to give treatments to patients from 9am to 4pm. Patients there need to pay consultation fees to the first accused's mother. They returned to Kampar at 5pm. At about 6pm, the first accused went to Ipoh to attend his medical course and returned

JOBNAME: No Job Name PAGE: 43 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

home at 10pm. At about 11pm he went to sleep.

(e) 25 April 2007:

The first accused woke up as usual at 6 something in the morning. After breakfast the first accused sent his mother to see one patient in Lawan Kuda from 9.45am–11.45am. After lunch the first accused sent his mother home at about 1.30pm. After that he went to one Mr Yong's house to repair his computer because of virus infection. He spent about 1½ to 2 hours in Mr Yong's house.

As usual he went to attend his medical course in Ipoh from 7.30–10pm He reached home at about 11.15pm. He took his bath, read his notes and went to bed before midnight.

(f) 26 April 2007:

The first accused got up at 5.30am. At 6am, he, his mother and another Chinese physician left for Ipoh. They had breakfast in Yook Fook Mu Restaurant in Ipoh. After that they went to Parit Buntar. His mother and the other Chinese physician gave treatments to patient in a Chinese medical shop from 9.45am to 4pm. The first accused said he was all the time with his mother. Later all the three of them had dinner in Ipoh around 7pm. The first accused then went for his Chinese Medical class from 7.30–10pm while his mother and the Chinese physician went to Ren Ai Association. The Chinese physician picked the first accused after his class and dropped him and his mother in Kampar.

The Chinese physician then left for Tanjung Tualang. The first accused and his mother went to bed before 12 midnight. The first accused said while his mother was giving acupuncture treatment to her patients he would help by giving massage therapy and physiotherapy to the patients.

(g) 27 April 2007:

As usual the first accused after doing the routine chores, he sent his mother to see a patient in Lawan Kuda from 9–11am After that they came home to have lunch. At 2pm the first accused left for Ipoh. He was at Recycle Department from 3–5pm He went there to discuss about the collection of recycle items and its sale with Yong Kin Him ('SP10').

He left the Recycle Department at 5pm and reached home at 6pm. While at home he did his assignment. After that he went to sleep.

JOBNAME: No Job Name PAGE: 44 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

He said his mother went to bed slightly earlier.

(h) 28 April 2007:

After his morning chores, he sent his mother to visit a patient in Mew Wah Loong Village at 10am. After the treatment, they reached home about 12 noon.

He was in the house in the afternoon except that he went out for ten minutes to buy some drinks. At night, he surfed his net for 1½ hours and then he did his assignment and went to bed.

(i) 29 April 2007:

After the morning chores, he and his mother left for Ren Ai Association. They were giving treatment to the patients in Ren Ai Association from 9am to 4pm.

After giving treatment, they went back to Kampar and went to the Pizza Hut. Around 8pm the first accused went to Tanjung Tualang alone to meet his adopted brother by the name of Kah Lok to give massage to theraphy as he complained of backache. He reached his home in Kampar at 10pm. After that he went to bed. He told the court that he never went to his No 2 Bercham house from 20–29 April 2007 because he did not have any order to repair computers from his clients during that period.

The first accused told the court that Dolphine came to see him in Ipoh Garden East on 18 April 2007 around 5pm. Dolphine told the first accused that he wanted to use his Bercham house as he had just come back from Penang and he did not want to stay in hotel.

The story of Dolphine

[143] The first accused said when Dolphine came to see him in Ipoh Garden East on 18 April 2007 around 5pm, Dolphine told him that he wanted to use his No 2 Bercham house as he had just come back from Penang and he did not want to stay in hotel. At that time, the second accused was with him. He then handed over the only set of house keys to Dolphine on 18 April 2007. Dolphine returned the key to him on 29 April 2007 at 11am at Ren Ai Association. The first accused said he did not know when Dolphine started using the No 2 Bercham house.

JOBNAME: No Job Name PAGE: 45 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

A His arrest by the police

[144] On 1 May 2007, when the police raided his house in Kampar he was sleeping in the living hall. He heard somebody crashing his door and said 'if you don't open this door, I will shoot you'. He saw a group of people in front of the door. He phoned Mambang Di Awan Police Station informing that a group of people was trying to crash his door. The group of people broke the grill and the wooden door.

[145] The first accused asked his mother to hide herself in the room and he himself went to hide in his room.

[146] Ten people came inside his house. Three of them that is, two Malays and one Indian came to his room. One of them, an Indian pointed a gun at him. They handcuffed him without identifying themselves as police. They asked him 'where are the jacket and the money?', meaning the jacket with the *Jawi* writing he wore to withdraw the money from the ATM. When the first accused could not show the jacket they wanted, they started to beat and slap him. After that they dragged him out of the room to the living hall.

[147] Then the Indian man came out from his room and showed him a NOKIA N70 handphone asked: 'Is it yours?'. The first accused replied 'It is not mine'. The first accused confirmed that the NOKIA handphone belonged to Dolphine. Dolphine asked him to keep the handphone for him for a few days and he would come back to collect it from him.

[148] The first accused said Dolphine gave him the handpohone on 29 April 2007 at 11 something in the morning in Ren Ai Association when he returned the house keys to him. Dolphin also passed him one box which contained a doll with a receipt to be passed to the second accused. Then the first accused phoned the second accused to collect the box from him in Ren Ai Association. About noon, the second accused came to collect the said box from him.

[149] The first accused said the group of people then found a Honda Civic car in his car porch. They asked for the car key. They then opened the car door with the key and conducted a search in the car. While the group of people were searching his car DSP Shahadan SP19 came and identified himself to him as police. The police spent about ten minutes in his house.

I The recovery of the No 2 Bercham house

[150] On 4 May 2007, at about 3pm, DSP Thiew interrogated him. After that, the first accused took DSP Thiew and his police party to the Bercham house. The police used the car keys which were taken from the dash board of his

JOBNAME: No Job Name PAGE: 46 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

Honda Civic car to open the house. The police recovered several incriminating things in the No 2 Bercham house. When a knife P51A was shown, the first accused admitted that the knife was his and he bought it from Makro.

(A plastic string P62A was shown).

[151] The first accused told the court that he used this string to tie the CPU and monitor, when he sent them to his client, (when the cushion covers P25A, P26A and P23A were shown).

[152] The first accused admitted that these items were cushion covers for the furniture in the No 2 Bercham house when he left on 17 April 2007. He said before he left the No 2 Bercham house, he never noticed any stain on these cushion covers.

[153] When a pair of Mizuro shorts was shown, the first accused said he had never seen this exhibit in the house when he left on 17 April 2007.

[154] The first accused was also shown a roll of blue cloth ('P27B'), he said he used the cloth to wrap computer, CPU and monitor when he delivered them to his clients to avoid scratching. He also denied seeing the handcuff ('P60A') in the house when he left the house on 17 April 2007. He told the court that the second accused was attending to the business in the No 2 Bercham house from 9–17 April 2007. He remembered he went there on 11, 13–17 April 2007.

[155] The first accused said it was he who told DSP Thiew SP38 that Tony's car was parked in the industrial area. He said Dolphine told him that Tony's car was at the industrial area for servicing when the handed the house key to him.

[156] The first accused said when he brought the police to the industrial area where Tony's car was parked. The police opened the car with the keys which they took from the wall of the No 2 Bercham house. When the police saw the keys hanging on the wall, they asked the first accused whose car key was that. The first accused replied that it looked like his friend's (Tony) car key.

[157] The first accused denied having sent any SMSes to SP26 using. the deceased's handphone demanding RM200,000. He also denied having withdrawn RM4,500 from Tony's Maybank account at Sg Siput Branch. He did not send any video clip of Tony to SP26 vide website link www.safelife.com/files 674365 on 27 April 2007.

[158] He said he and the second accused did not kidnap Tony to get the ransom of RM200,000 between 20 April 2007 and 26 April 2007 at about

JOBNAME: No Job Name PAGE: 47 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

2.30pm. They also did not confine Tony in the Bercham house at No 2 from 20 April 2007 to 26 April 2007. They also did not murder Tony between 26 –29 April 2007.

The defence of the second accused

[159] The second accused aged 19 years was staying with his parents in house No 23 Kampar Avenue Kampar Garden, Ipoh. His father Yan Koon Tet was a second hand car dealer. His mother Ng Ah Kwai worked as a cleaner in a restaurant from 8am to 6pm He has an elder sister by the name of Yan Chooi Lai who worked as a promoter. He had an uncle Yan Yoon Chong who was also staying with them.

[160] The second accused told the court that since 1 May 2007, his elder sister was unemployed and was staying at home most of the time.

[161] The second accused said he knew the first accused. He was helping the first accused in repairing computers in 2006.

[162] He also knew a person called Dolphine through the first accused. He got to know Dolphine in 2006 when Dolphine and the first accused went out for a drink in Ipoh Garden East.

[163] The second accused said he did not know Tony (the deceased). He knew Dolphine on 18 April 2007 at about 5pm when he, first accused and Dolphin went out for a drink.

[164] He saw the first accused passing the No 2 Bercham house keys to Dolphine. The first accused said Dolphine wanted to borrow the premises.

[165] The second accused admitted that he was the one who signed the tenancy agreement and the first accused was the one who paid the rental. The second accused said they rented the Bercham house to repair computers. They started renting the house on 5–7 April 2007.

[166] He said he saw the landlord handing one set of keys to the first accused. He said usually the first accused would arrive at the Bercham house and was followed by him. The second accused said he never stayed in the Bercham house.

[167] The second accused said he had serviced and repaired 23 computers in the Bercham house from the date the house was rented until the date of his arrest.

JOBNAME: No Job Name PAGE: 48 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[168] After the service and repair of each computer he would cut a piece of cloth and used it to wrap the computer and tie it with a string and then sent the computer to the client. He said he needed to wrap the computer to prevent it from being scratched or dust. He also said the cloths and string were brought by the first accused to the house.

[169] He said the last service of the 23 computer was on 16 April 2007 and the computer was returned to the client on 17 April 2007. After 17 April 2007, he did not at any time go back to the house.

[170] The second accused said besides helping the first accused in servicing and repairing computers he also helped him selling alarm clock and organisers. He also said he had dandruff problem. He would scratch his head whenever it was itchy and the scratching would probably cause his hairs to drop.

[171] He told the court that from 17 April 2007 until the date of his arrest, he was in his house in Taman Kampar with his parents, elder sister and his uncle.

His alibi defence

[172] On 20 April 2007, it was a Friday. He stayed at home playing computer and surfing internet until 1am.

[173] 21 April 2007 was a Saturday. When he woke up at 10.30am or 11am his father, elder sister and uncle were at home and his mother was at work. He went out for food and then he went to cyber cafe to play computer and returned home at about 2pm. At 5pm he went out to buy snack and topped up his card and bought dome daily food and returned home at 5.30pm or 5.40pm After that he did not go out and he slept at 1am.

[174] On 22 April 2007 he woke up at 10.30am–11am. His parents, elder sister and his uncle were at home.

He went out to buy top up card for his handphone at 8pm and home at 8.30pm He said he talked to his girl friend Lee Kah Lai ('SP34'). For that day he did not go out any more.

[175] 23 April 2007 was a Monday. He woke up as usual and went out for food at 12 noon. He returned home at 2pm. At 8pm he went out to look for friends for tea. He returned home at 8.45pm and went to bed at 1am.

[176] 24 April 2007 his activities were the same as the day before. He did go out to buy top up card. After that he returned home and went to bed at 1am.

JOBNAME: No Job Name PAGE: 49 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[177] 25 April 2007 was a Wednesday. His activities were the same as the previous day. He went out at 9pm for 45 minutes and returned home. He went to bed at 1am.

[178] 26 April 2007 was a Thursday. He woke up at 10.30am or 11am. He went out for food at 12 noon and then he went to cyber cafe to play computer and returned home at about 2pm. At 5pm he went out to buy snack and topped up his card and returned home at 5.30pm. After that he did not go out and he slept at 1am.

[179] 27 April 2007 was a Friday. He woke up as usual and went out for food at 12 noon and then went to the cyber cafe. He returned home at 2pm. At 5pm he went out for about 30–45 minutes to help his family, to buy some daily goods. After hat he returned home and did not go out anymore. He slept at 1pm.

[180] 28 April 2007 was a Saturday. He woke up at 9.30am. He went to his girl friend's house (SP34). He reached his girl friend's house at 11am. They went for food and returned to his Kampar house. At 1.30pm they went out for lunch and returned home at 2pm. After that they did not go out. His girl friend slept a night in his house. They slept at 11.30pm.

[181] 29 April 2007 was a Sunday, he woke up at 9.30am. At 12.30 noon he went to Ren Ai Association to collect a teddy bear and a handycam from the first accused. He returned home at 2pm and then brought his girl friend (SP34) to the supermarket, the zoo and the lake garden in Taiping.

[182] He said he had purchased ticket to go to the Taiping Zoo. After visiting Taiping, he sent his girl friend (SP34) home and he reached home at 9pm. He said he was using his car to go to Taiping. He used the smart tag to pay the toll.

[183] He said he had given the teddy bear (P31A) to his girl friend after his return from Taiping. He said it was Dolphine who helped him to buy the teddy bear (P31A). He said while he was with the first accused and Dolphine over a cup of tea, Dolphine volunteered to buy things for them as he was collecting some bonus points which could be used to exchange things. Under such circumstances the second accused asked Dolphine to buy the teddy bear and handycam for him.

[184] After buying the said items, Dolphine passed the teddy bear and handycam to the first accused in Ren Ai Association. The second accused then collected the two items and the receipt from the first accused (the receipt P120A(4) was shown to the second accused and identified by him).

JOBNAME: No Job Name PAGE: 50 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[185] The second accused told the court that he had all together given three dolls to his girl friend (SP34). P31A was one of the dolls he gave to his girl friend (SP34). The sizes of the other two dolls are more or less the same as P31A. He also claimed that he never owned any credit card and never used it before.

[186] He also said from 20–29 April 2007, he did not purchase anything from Jaya Jusco Ipoh. He had also never been to Jaya Jusco Ipoh during that period. He had also never used any ATM card to withdraw money from any bank. He identified one camera Sony Cybershot P122A as the item he purchased.

[187] He also said the box of gloves ('P45A') was brought to the Bercham house by the first accused for his use while repairing the computer hard wares and checking the computer processor.

[188] He said he never owned the following items shown:

(a) cannon printer model — CP730;

(b) photo paper;

(c) Ambi Pur;

(d) one white towel — P63A;

(e) Mizuro shorts — P64C;

(f) three Petronas receipts — P57B (1–3);

(g) one Tejani Medical Services — P57F; and

(h) handcuff — P60A.

[189] He said the above items were not in the No 2 Bercham house when he last visited the house. He said he did not know to whom the said items belonged.

[190] He said on the day of his arrest, his parents, elder sister and uncle were at home and his girl friend was with him in his room. The police did ask his girl friend to come out from his room and the police had beaten him up. The police asked him where he was on 29 April 2007. The second accused replied saying that he went to Taiping Zoo. The police said he was lying. In the meantime, the police searched his room. He did not know whether the police had seized any items from his room.

[191] He said he did sign P113 at the police station, but he did not see the form clearly because he signed it hurriedly.

JOBNAME: No Job Name PAGE: 51 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[192] He said items 2 and 3 in P113 belonged to his girl friend and item 10 did not belong to him.

[193] He also said while being detained two police personnel did interrogate him. They beat him and threatened him during the interrogation.

[194] He admitted he was brought by the police to the recovery of the teddy bear from his girl friend's house and the handycam from his house.

[195] He said he never detained or kidnapped anyone in the No 2 Bercham house in the month of April 2007. Neither did he injure anybody in the month of April 2007. He also did not ask for any ransom money from anybody in April 2007. He had no financial problem in the month of April 2007. He also did not plan with the first accused to commit any criminal offence in April 2007.

[196] He also said he never committed any murder in April 2007. He also did not throw any dead body in April 2007.

SD3 Fong Ngan Thai (alibi witness)

[197] SD3 has two sons: one is the first accused and the other is Chew Wai Loon. She is a Chinese physician and had been staying at No 113A, Mambang Diawan Kampar for 40 years.

[198] On 1 May 2007 the first accused was arrested by the police. The first accused worked as a car insurance agent, a Jabatan Pengangkutan Jalan runner and a computer repairer. She did not know whether first accused was doing computer repair business elsewhere except in Kampar. She also did not know whether there was any person working with him in his computer repair business:

(a) on 20 April 2007, it was a Friday. On that day about 11pm she and the first accused went to bed in the hall. She said she was a heart patient. She had undergone some heart operation in Institut Jantung Negara Kuala Lumpur. She slept in the hall because if anything happened to her it would be easier for her to call her son to send her to the hospital;

(b) on 21 April 2007 (Saturday), after the morning chores, the first accused sent her to Kampar to treat a patient between 1–2pm. She was a Chinese physician specialising in acupuncture and 'tuina'. She had a certificate from Kolej Perubatan Traditional Cina

JOBNAME: No Job Name PAGE: 52 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

confirming that she had taken the subject of 'tuina' from that college. After giving treatment, she and the first accused returned home. They reached home at 4pm. The first accused was doing some revision for his Chinese medical course from 6–7pm. They took their dinner at 6–pm and then they watched television. They went to bed that night around 11pm;

(c) on 22 April 2007, she got up at 6 something in the morning. At about 8am to 9am she and the first accused went to Ren Ai Association to give free treatment to patients until 5pm She said the first accused was with her from 9–5pm.

From 5–7pm she and the first accused attended a monthly meeting in Ren Ai Association. After the meeting, they went for dinner and then they returned home. They went to bed around 11pm;

(d) on 23 April 2007, she woke up as usual. At about 8.30am, she and the first accused went to one 'pertubuhan amal' in Temoh to give free treatment to 20–30 patients until 4pm.

At 5pm she, the first accused and a group of co-workers went for some food. Then they returned home. At 7pm the first accused went for his badminton game. After his game, at 9pm the first accused came home. She and the first accused went to bed around 10–11pm;

(e) on 24 April 2007, after the morning breakfast, she and the first accused went to an old folks club called Yee Ching Club to give treatments to patients until 4pm. After that they returned home.

At 6 something in the evening the first accused went for his Chinese medical class from 7.30–10pm. The first accused returned home at 11pm and bathed, rested for a while and went to bed;

(f) on 25 April 2007, after breakfast, the first accused sent her to Lawan Kuda in Gopeng to give treatment to one stroke patient for 1–2 hours. After that they returned home. At about 6pm the first accused went for his class. He returned home from his class at 11pm to 12 midnight. He bathed, rested a while and went to bed;

(g) on 26 April 2007, at about 6am SD2, the first accused together with a colleague also a Chine physician (Cheng Kwei Yong) went to one Chinese medical shop in Parit Buntar to give treatment. They finished their treatment at 5pm. They left and reached Ipoh about

JOBNAME: No Job Name PAGE: 53 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

6.30pm. The Chinese physician sent the first accused for his class at 7pm.

When the first accused finished his class at 10pm, Cheng Kwei Yong went and picked him up. After sending SD2 and the first accused home, Cheng Kwai Yong went back to Tanjung Tualang. SD2 and the first accused went to bed at 11pm;

(h) on 27 April 2007, after the breakfast the first accused sent SD2 to treat a stroke patient in Lawan Kuda. After the treatment, they reached home at about 11.30am.

The first accused went to the Recycle Department Ren Ai Association in Ipoh to do his work from 12 noon to 1pm. He returned home at 6pm. He did some school work and went to bed about 10pm;

(i) on 28 April 2007, after the breakfast, SD2 and the first accused went to one Kampung Wah Long in Kampar to give treatment to a teenage stroke patient. They spent two hours there and returned home. They did some house work. The first accused did not go out. He revised his medical course homework. He went to bed around 11pm; and

(j) on 29 April 2007, SD2 said they did the same activities as on 22 April 2007. After giving treatment, they came home at 6pm.

After dinner, the first accused told her that he was going to Tanjung Tualang to give treatment to a patient. The first accused returned home at 10pm and went to bed at 11pm.

SD2 said she did not keep any record about her activities and movements from 20–29 April 2007. She said she could remember because her activities for each Monday are the same. The same applies to other days.

However SD2 agreed with the prosecution that if the first accused went to the No 2 Bercham house at any time in the month of April 2007, she would not know.

SD4 alibi witness Yan Chooi Lay for the second accused

[199] SD4 told the court that in April 2007, she stayed at No 23 Lebuh Raya Kampar together with her parents, her uncle and two brothers, (Yan Wai Mun) and Yan Wai Seng (the second accused).

JOBNAME: No Job Name PAGE: 54 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[200] She said in April 2007, her mother went to work in a restaurant from 6 am–5 pm. She said she was at home most of the time.

[201] She also told the court that in the month of April when she was not working, she saw the second accused went out to work as computer repairer. She said the second accused went out for work every day at 8–9am and returned from work at 7pm or 8pm. After coming home from work, he bathed, ate his dinner and then watched TV.

SD5 — Ng Ah Kwai

[202] SD5 told the court that in April 2007 she was staying at No 23 Kampar Avenue Ipoh. She had three children namely Yan Wai Seng (the second accused), Yan Chooi Lay ('SD4') and Yan Wai Mun.

[203] SD5 said her daughter SD4 had some health problem. She was still receiving some treatment. She was different from other ladies. She was not smart and she was 'lembab'.

[204] SD5 confirmed that SD4 did not work in the month of April 2007.

[205] SD5 said the second accused worked as a computer repairer. Most of the time in April the second accused took back the computers and did the repair at home.

[206] SD5 said she worked in a restaurant from Monday to Saturday. She said 21 April 2007 was a Saturday when she woke up at 6.30am, the second accused and her, daughter SD4 were at home. When she left for work at 8.30am the second accused was still sleeping. When she returned from work, the second accused and SD3 were at home. When she came back from work the second accused did go out for half an hour. When she went to bed, the second accused was still awake.

[207] On 22 April 2007, when SD5 woke up at 6.30am, the second accused, SD4 and her brother in law were at home. On that day, it was a Sunday she did not go to work. The second accused woke up at 11am. During day time the second accused did not go out. At night he went out for half an hour. After that he spent time repairing computer. SD5 said she went to bed at 10pm On 23 April 2007 as usual when she woke up, her husband, the second accused, SD4 and her brother in law were at home. She went to work at 8am and returned home at 5.30pm. At that time she saw SD4, the second accused and her brother in law at home. On that day, she could not remember whether the second accused had gone out in the evening. She went to bed at 10pm.

JOBNAME: No Job Name PAGE: 55 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

[208] On 24 April 2007, when she woke up she saw the same persons at home. When she returned from work she said, the second accused, SD4 and her brother in law at home. The second accused went out at 8pm but returned home at 8.30pm. After that the second accused did not go out. SD4 went to bed at 10pm.

[209] On 25 April 2007, when she woke up and went to work at 8.30am and when she returned from work at 5.30pm, she saw the same persons at home. On that day the second accused did go out at 6pm.

[210] After half an hour, the second accused returned home and did not go out. SD5 went to bed at 10pm.

[211] On 26 April 2007, SD5 said when she woke up and went to work at 8.30am and when she returned from work at 5.30pm. She saw the same persons at home. The second accused did not go out that day and SD5 went to bed at 10 pm.

[212] On 27 April 2007 SD5 woke up at 6.30am, the same persons were at home. She went to work at 8.30am and returned from work at 5.30pm. When she came home, the same persons she described earlier were at home. The second accused did not go out. She slept at 10pm.

[213] On 28 April 2007, she woke up at 6.30am and she went to work, at 8.30am and returned from work at 5.30pm.

[214] When she came home she saw SD4, the second accused with his girlfriend Lee Kah Lai (SP34) and her brother in law at home. The second accused did not go out that night. When SD5 went to bed, the second accused and his girlfriend were still awake.

[215] On 29 April 2007, SD5 woke up at 6.30am, she saw SD4, the second accused and his girlfriend and her brother in law and her husband were at home. SD5 did not go to work because it was a Sunday. The second accused woke up at 9am. He went out at 12 noon and came back at 2pm. After that the second accused took his girlfriend to the Taiping Zoo.

[216] The second accused told SD5 that he was going to Taiping Zoo. The second accused came home alone at 9pm. After that he did not go out. SD5 went to bed at 10pm and the second accused was still awake.

[217] SD5 said she knew that the second accused did computer repair outside. She said she did not know with whom the second accused was doing the

JOBNAME: No Job Name PAGE: 56 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

computer repair work outside for the month of April 2007. She remembered that the second accused was arrested on 1 May 2007.

[218] She said she could remember the incidents that took place from 21–29 April 2007 because SD4 and the second accused were not working and sometimes the second accused would talk to them about things that happened.

FINDINGS BY THE COURT AT THE END OF THE DEFENCE CASE

[219] Having heard the defence put forward by both the accused persons and the written submissions by both the parties, I find that the defence raised by the first and the second accused consists of two parts:

(a) the alibi defence of the first and second accused persons that between 20–29 April 2007, they were in their respective homes in Kampar. They denied having gone to the No 2 Bercham house; and

(b) Dolphine was the person who borrowed the keys to the No 2 Bercham house from the first accused on 18 April 2007 and returned the keys to the first accused on 29 April 2007. It was Dolphine who gave the deceased's handphone to the first accused asking him to keep for a few days and it was Dolphine who told the first accused that the deceased's car was parked in the industrial area.

[220] On the issue of the defence of alibi:

(a) having carefully considered the alleged defence of alibi put forward by the first accused person, which was purportedly supported by the evidence of his mother SD3, I find that the defence is highly unbelievable and unacceptable for the following reasons:

(i) SD1's and SD3's precised description of each event which took place with its precise time on each day from 20–29 April 2007 is highly unbelievable because firstly the events took place five years ago and SD1 and SD3 said they did not keep records of what they did each day from 20–29 April 2007. I am of the considered view that it would not be possible for a reasonable person to know the precise time of each activity carried out by SD1 and SD3 on each day which took place five years ago and without reference to any written records even though SD1 and SD3 claimed that the events or the activities which they carried out were routine matters;

(ii) according to their alibi defence during the period from 20–29 April 2007 the first accused ('SDF1') spent almost all the time with SD3 his mother helping in treating her patients.

JOBNAME: No Job Name PAGE: 57 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

I find it hard to believe the defence story firstly, if these were the routine activities carried out by SD1 and SD3 from Monday to Sunday throughout the year that would mean that SD1 would have no time to do his core business as a computer repairer, insurance agent and Jabatan Pengangkutan Jalan runner. Secondly it is also strange that SD1 suddenly stopped going to the No 2 Bercham house which was rented by SD1 and SD2 for the purpose of servicing and repairing computers for customers from the Ipoh area from 20–29 April 2007. The reasons given by the SD1 were that he did not go to the No 2 Bercham house during the period that is from 20–29 April 2007 because he received no orders from his customers for the servicing and repairing of computers. I find that such reasons are unacceptable; and

(iii) I also find that it is not safe to rely on SD3's evidence simply because SD3 who was the mother of SD1 was certainly not an independent witness. Her evidence must be treated with the greatest caution,

(b) as regards the purported alibi defence given through SD2, SD4 and SD5; I find that SD1's alibi defence is just mere denial of his presence in the No 2 Bercham house during the period from 20–29 April 2007. The evidence of SD5 (SD2's mother) could not corroborate the evidence of SD2 because according to SD5, she had to work in a restaurant from Monday to Saturday except Sunday from 9am to 5pm. She would not know what SD2 would have done while she was working. In fact I find that SD3's evidence had completely destroyed the purported alibi defence raised by SD2.

I find that SD3 is a witness with a simple mind and is a truthful witness despite the fact that she had some health problem.

[221] On the whole I find that the purported alibi defence raised by the first and the second accused has failed to create any reasonable doubt in the prosecution case.

[222] On the defence whether Dolphine could be the person who kidnapped and murdered the deceased based on the grounds that:

(a) he was alleged to be the last person who asked for permission from SD1 to use the No 2 Bercham house from 18–29 April 2007;

(b) he told SD1 that the deceased's car was parked in the industrial area;

(c) he asked SD1 to keep the deceased's handphone P19A for a few days after the alleged incidents; and

JOBNAME: No Job Name PAGE: 58 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

(d) there was a SMS received by SP26 that Dolphine was the last person with the deceased.

[223] I find that such a defence is totally without merits based on the following reasons:

(a) if what SD1 said was correct, he would be the first person to inform the police at the first available opportunity that Dolphine was the last person who used the No 2 Bercham house and the handphone P19A was given to him by Dolphine. However he did not inform the police about Dolphine at all;

(b) neither did SD1 or SD2 cross-examine SP19 or SP38 or any of the police witnesses that Dolphine was the main suspect of this case;

(c) SP5, a neighbour was never asked if he had seen a third party coming to the No 2 Bercham house during the period from 18–29 April 2007;

(d) I am of the considered view that if Dolphine was a culprit in this case, the first thing that he would have done after he had committed any criminal offence in the No 2 Bercham house was to destroy all the incriminating evidence like the handcuff, string, or the deceased's shorts in the said house.

I also find that it would be out of his mind to ask the first accused (SD1) to keep the deceased's handphone which contained all the incriminating massages after he had committed the alleged offences and to tell SD1 that the deceased's car was parked in the industrial area; and

(e) as regards the message that the deceased had gone to meet one Dolphine which was received by SP26 could be a message sent by the first and second accused to confuse everybody especially the police.

[224] For the above reasons I find that the defence that Dolphine could be the person who committed the said offences has failed to create any reasonable doubt in the prosecution case.

[225] At the end of the defence case, I am satisfied that the prosecution has proved its case beyond reasonable doubt against both the accused persons in respect of the two charges that is as per charges in exhs P2A and P4.

[226] I therefore found that:

The first and the second accused guilty and convicted of (a) the offence kidnapping

JOBNAME: No Job Name PAGE: 59 SESS: 1 OUTPUT: Thu Jul 24 12:19:46 2014

as per charge in exh P2A and (b) of the offence of murder as per charge in exh P4.

[227] I sentenced the first accused to death that is to be hanged by the neck until death for the charge of kidnapping and I also sentenced the first accused to death that is to be hanged by the neck until death for the charge of murder.

[228] I also sentenced the second accused to death that is to be hanged by the neck until death for the charge of kidnapping. I also sentence the second accused to death that is to be hanged by the neck until death in respect of the charge of murder.

First and second accused convicted and sentencing to death by hanging.

Reported by Kanesh Sundrum